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No.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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RUTH RUSHEN, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOHNNY SPAIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP
Attorney General of the
State California

RICHARD R. IGLEHART
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

MORRIS BEATUS
Supervising Deputy Attorney General

RONALD E. NIVER
Supervising Deputy Attorney General

455 Golden Gate Avenue
Room 6000
San Francisco, California 94102
Telephone: (415) 557-2653

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the decision by a state trial court to restrain a defendant, and the decision about the form of the restraint to be used, are questions of fact whose resolutions must be accorded deference by federal courts under 28 U.S.C. § 2254(d)?

2. (a) Whether the Constitution requires the use of the "least restrictive alternative" in restraining a criminal defendant and, (b) whether, under any standard, the defendant is obliged to assist the court in selecting the most appropriate restraint?

3. Whether the use of shackles affected the reliability of the fact-finding process, where respondent and his shackled codefendants were acquitted on 39 of 45 counts and respondent refused at an evidentiary hearing, which he requested, to explain how the use of restraints prejudiced his defense?

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 22, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 883 F.2d 712. A copy of the opinion is attached to this petition as Appendix A. The opinion of the District Court for the Northern District of California is unreported. A copy of the opinion is attached to this petition as Appendix B.

This case was before this Court once before. *Rushen v. Spain*, 464 U.S. 114 (1983).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 22, 1989. Rehearing was denied on December 8, 1989. (App. C.) This petition for writ of certiorari followed within 90 days. 28 U.S.C. section 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, section 1, provides in part:

> "[N]or shall any State deprive any person of life liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. State Proceedings:

On October 1, 1971, the Marin Court Grand Jury filed an indictment charging respondent Johnny Spain with five counts of murder, in violation of California Penal Code section 187; one count of conspiracy (§ 182) to escape (§ 4530(a)), to possess a firearm (§ 4574), and to kidnap (§ 207); and one count of assault with a deadly weapon by a life prisoner upon a non-inmate (§ 4500). (SCT 1-8.)[1] Six other persons (Stephen M. Bingham, David Johnson, Hugo A. Pinell, Fleeta Drumgo, Luis N. Talamantez, and Willie Tate) were charged with these and other offenses in the indictment.

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[1]"SCT" designates the Clerk's Transcript of the proceedings in state court.

During the next three and one-half years, six of the defendants[2] filed nearly 200 written motions. Trial finally began on March 25, 1975. (SCT 2721.) On August 12, 1976, the 226th day of trial, after 24 days of deliberation, the jury found respondent guilty of two counts of murder, and of conspiracy to escape. The jury found him not guilty on all other counts. (SCT 5300-5306.)

On October 1, 1976, the state trial court denied respondent's motion for a new trial and sentenced him to state prison for a term of life. (SCT 5505-5506; 5507-5508.)

On July 24, 1980, the California Court of Appeal, First Appellate District, affirmed the judgment of conviction of respondent and two other convicted defendants (Pinell and Johnson) in *People v. Spain, Pinell,*

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[2]Bingham was not tried until 1986. (App. B. at 3n.1.)

and Johnson, No. 1/Crim. 16126, in the files of that court. (CR 1; Exh. D.)[3] The California Supreme Court denied a hearing on October 15, 1980 (CR 1; Exh. B). *Rushen v. Spain*, 464 U.S. 114 (1983).

B. Federal Proceedings:

On December 31, 1981, after exhausting state remedies, respondent filed a petition for writ of habeas corpus in Federal District Court, alleging: (1) an *ex parte* communication between the trial court and a juror violated his right to be present and his right to counsel; and (2) the use of shackles during trial violated his due process right to be presumed innocent. (CR 1.) On June 29, 1982, the District Court issued the writ, ruling that the

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[3]"CR" refers to the District Court Clerk's Record, followed by the docket number and page number. "CR 1" designates respondent's petition for writ of habeas corpus in federal district court. A copy of the above-referenced opinion is attached to this petition as Appendix D.

ex parte communication required automatic reversal. It made no ruling on the shackling issue. 543 F.Supp. 757 (N.D. Cal. 1982). The Court of Appeals for the Ninth Circuit affirmed. 701 F.2d 186 (1983). This Court summarily reversed (464 U.S. 114), and remanded to the District Court for a resolution of the shackling issue. (*Id.* at 117 n.1.)

On remand, the District Court referred the case to a magistrate for an evidentiary hearing to determine the effect of the shackling on respondent's ability to cooperate with his trial attorney and to testify in his own defense. (App. A, at p. 9744.) The magistrate issued her report on October 9, 1985. (App. A at pp. 9744-9745.) The District Court issued a second writ of habeas corpus on September 22, 1986. (App. B.) The Court of Appeals for the Ninth Circuit affirmed on August 22, 1989 (App. A), and denied

the petition for rehearing on December 8, 1989. (App. C.)

STATEMENT OF FACTS

The opinion of the Court of Appeals adequately summarizes the facts of the offenses and the nature of the restraints used upon respondent at trial. We set forth that court's summary:

"In 1971, Johnny Spain was imprisoned in San Quentin Prison and was a member of the Black Panther Party. Spain was serving a life sentence for a 1967 conviction for first degree murder. In May of 1971, Spain was transferred to the Adjustment Center at San Quentin, a three-story structure primarily used to segregate and discipline disruptive prisoners.

"On August 21, 1971, there was an outburst of deadly violence at the Adjustment Center. George Jackson, also

a member of the Black Panther Party, returned to the Adjustment Center after meeting with his lawyer, Stephen Bingham. When guards found a bullet clip on Jackson, Jackson removed a gun from under his wig and forced one of the guards present to open the cells of other prisoners. Many of the prisoners, including Spain, emerged from their cells. There was testimony that Spain played a role in binding guards and placing them in the cells where they subsequently were assaulted. He was seen approaching the guards with an earphone cord in his hands. The cord was the type used to bind the guards. There also was testimony that at one point he held Jackson's gun, which was used to murder two of the guards.

"When an alarm was sounded, Jackson and Spain fled from the Adjustment Center, Jackson with a gun in his

hand and Spain with some keys. Jackson was shot by guards and was killed instantly. Spain dove into some bushes where he was found hiding. When order was restored the aftermath of the violence was revealed: one officer had bled to death from a neck wound; two had been shot to death in the head; three others had their throats slashed, but survived; and two prisoners died of similar wounds. The Director of Corrections called the incident the worst in her eight years as Director.

"Officials found a number of weapons and knives in their subsequent search. In Spain's back pocket, officials found a six inch long vial wrapped in tape, which Spain identified as an explosive. A search of Spain's cell revealed a road map with an escape route and, hidden inside bars of soap, thirteen rounds of .38 caliber

ammunition, four .410 gauge shotgun shells, and one .22 caliber magnum shell.

"Spain was charged with five murder counts, one conspiracy count, and one assault count. The prosecution attempted to show that the Black Panther Party had organized the escape attempt and that Spain was linked to the conspiracy by his membership in the Black Panthers. Spain did not testify; his defense was that he could not recall anything from the time his cell door opened to the time he ended up outside the Adjustment Center.

"In a trial with five other prisoners, Spain was found guilty of two counts of first degree murder and of conspiracy to escape by force or violence; he was acquitted of the other four counts. In the courtroom during the trial, Spain was shackled. He wore leg irons,

a waist chain to which each of his hands were bound by individual chains about eight inches long, and chains that apparently held him to his chair. Spain, already serving a life term for murder, was sentenced to another term of life imprisonment in 1976." (App. A, at pp. 9742-9744; fns. omitted.)

REASONS FOR GRANTING THE WRIT

Eighteen years ago six persons died during an attempted escape from San Quentin Penitentiary. Respondent Johnny Spain was convicted for the murders of two of those persons. Respondent was shackled during the course of his seventeen-month trial. Previously convicted of first degree murder, imprisoned in a maximum security facility, charged with escape and five counts of first degree murder, and joined for trial with five other men with similar histories of violence, the state trial court determined that respondent was a uniquely appropriate candidate for physical restraint. So obvious was the need for restraint that the Ninth Circuit Court of Appeals rejected the ruling of the District Court that respondent should have been permitted to remain free until he attempted to hurt someone.

After reviewing the record *de novo*, the Court of Appeals concluded that "some measure" of restraint during trial was appropriate. We agree with the conclusion but not with the methodology. The trial court had reached the same conclusion 14 years earlier. It was in the very best position to resolve the issue of restraints in terms of both their necessity and extent. The Court of Appeals erred by failing solely to determine whether there was "fair support" in the record to justify the trial court's ruling. This failure constituted the assumption of a novel fact-finding role, one in which the Court of Appeals disregards whether the state court record supports the state court action, and determines instead whether the state court record also supports a more congenial alternative.

The Court of Appeals compounded the error by speculating about possible "lesser restrictive alternatives" to shackling and finding that the trial court failed to consider them. We question whether the standard of "least restrictive alternative" is constitutionally compelled. Even if it is, the trial court satisfied that standard. The alternatives suggested by the Court of Appeals -- banishment and fewer restraints -- simply were not viable. Respondent made no timely request to be excluded permanently from trial, and such an action by the trial court would have seriously interfered with respondent's ability to defend himself. Respondent had the alternative of fewer restraints but he refused the offer, saying, "all or nothing." Under any standard which the Constitution requires, a defendant who refuses to assist the trial court in the selection of the most appropriate restraint may not

later argue that a more appropriate alternative was available.

Finally, the Court of Appeals inexplicably failed to examine the jury's verdicts in determining prejudice. Acquittal of respondent and the shackled codefendants on 39 of 45 counts must defeat any claim that the jury was affected by the use of chains. The conclusion of the Court of Appeals that the use of restraints interfered with respondent's ability to assist in his defense finds no support in the record and is belied by respondent's refusal to explain at his requested evidentiary hearing how the shackles affected his defense.

This case is appropriate for this Court's plenary review because state courts must determine the need for security at their proceedings without fear of second-guessing years later by a federal court. In addition, and

despite this Court's direction, the Court of Appeals has consistently refused to accord due deference to factual findings by the state courts in this case. In so doing, the Court of Appeals has fundamentally misconceived its reviewing function, undermining the deference that the federal judiciary must accord to the state fact-finding process on habeas corpus. This misconception does violence to comity principles generally, and the ability specifically of the state trial court to respond to the acute needs of the moment. For these reasons, we submit that a grant of certiorari is not only appropriate but imperative.

ARGUMENT

THE STATE TRIAL COURT'S DECISION TO SHACKLE RESPONDENT WAS CONSTITUTIONALLY PROPER AND DID NOT DENY HIM A FAIR TRIAL.

The District Court held that the state trial court erred by imposing restraints upon respondent Johnny Spain during his trial in 1975-1976 for five counts of first degree murder and attempted escape from San Quentin Penitentiary. Although respondent was previously convicted of first degree murder, was confined in a maximum security facility at the time of the offenses, and was joined for trial with five other men with similar histories of violence, the District Court opined that the state trial court should have stayed its hand until one of the defendants assaulted someone. Unable to accept this "one bite of the apple" view of courtroom security (App. A at p. 9757 n. 12), the Court of Appeals nevertheless

affirmed the District Court's order granting a writ of habeas corpus. This affirmance was clear error. We argue:

(1) The need for, and extent of, courtroom security is an issue of fact within the discretion of the trial court. The federal courts must accord this finding of necessity a presumption of correctness under 28 U.S.C. § 2254(d).

(2) This Court has never held that the "least restrictive" form of courtroom security is the only constitutionally permissible protection which may be implemented. Such a rule distorts the Court of Appeals' review function and requires it to calibrate, at a distance of time and place, how a state trial court must respond to the potentially violent exigencies of the moment. The discretion which is invested in the trial court presupposes a degree of latitude in the selection of security which is

inconsistent with the rigid principle that Court of Appeals has imposed on the State of California.

(3) Even if the principle of "least restrictive alternative" is constitutionally compelled, respondent may not invoke it. He refused to assist the trial court in its efforts to explore alternatives to the restraints used during trial. That refusal must work as a default of the claim that a less restrictive alternative was not considered. Respondent did not ask to be excused from court during trial on days when he was "not feeling well" and declined to cooperate with the court when it considered the possibility of using fewer shackles. Respondent declared, "All or nothing." The Court of Appeals' retrospective solution -- banishment -- is the least defensible. Removal of a defendant for 17 months is not "less restrictive" than in-court restraints.

(4) The use of restraints did not taint the fact-finding process: (a) acquittal of the defendants on 39 of 45 counts establishes that the shackles did not subvert the presumption of innocence; (b) respondent admitted that he was physically able to testify but chose not to do so; (c) respondent, who presented an elaborate defense at trial, refused to explain at his evidentiary hearing how the removal of restraints would have aided, or even changed, his defense. We now state our positions at some length.

-A-

"It is [the trial judge] who is best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, and the prevention of other crimes." *United States v. Samuel*, 431 F.2d 610 (4th Cir. 1970); *accord, Brewster v. Bordenkircher*, 745 F.2d 913 (4th Cir. 1984); *Woodards v. Cardwell*, 430 F.2d 978 (6th Cir. 1970). Because the decision whether to restrain the accused requires such a sensitive assessment of the numerous relevant facts of which the trial court is solely and uniquely aware, its finding of necessity should be treated as a resolution of fact which is presumptively correct under 28 U.S. C. § 2254(d). *See Miller v. Fenton*, 474 U.S. 104 (1975); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985); *Patton v. Yount*, 467 U.S. 1025 (1984); *Rushen v. Spain*,

464 U.S. 114 (1983); *Maggio v. Fulford*, 462 U.S. 111 (1983); *Marshall v. Lonberger*, 459 U.S. 422 (1983). We think that two considerations militate in favor of requiring federal judges to defer to a decision by their state brethren on this issue.

First, the state trial judge is in a position "that is far superior to that of federal judges reviewing an application for writ of habeas corpus" (*Miller v. Fenton, supra*, 474 U.S. at 114), to assess the need for security. Second, the determination to use restraints "take[s] place in open court on a full record." *Id.*, at p. 117. When a trial court, fully apprised of the need for security in its courtroom, applies the correct rule of law to the relevant facts, its decision regarding the most appropriate form of protection for the personnel, jurors, and spectators in the court necessarily must be at least as reliable as a determination of a federal

habeas court reviewing a "cold" record years later. Section 2254(d) should apply to state court decisions to use shackles.[4]

The Court of Appeals did not address this issue, apparently applying a *de novo* standard of review. (App. A at pp. 9753-9755; *see Sumner v. Mata*, 449 U.S. 539, [1981].) The Court of Appeals thereby erred, as did the District Court, which specifically refused to presume the correctness of the state trial court's decision. (App. B at pp. 75-79.) Where, as here, the trial court holds a hearing on the issue (App. A at pp. 9767, 9771-9772), or the facts requiring shackling are incapable of dispute (App. A at 9753-9755) and the court applies the correct

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[4]At least one court has recognized "that most often in habeas cases the degree of deference owed to the state courts and the reviewing federal district court will weigh against such intensive sifting of facts." *Smith v. Kelso*, 863 F.2d 1564, 1568 fn. 4 (11th Cir. 1989), *cert. denied*, 109 S.Ct. 2079 (1989).

standard[5] (App. A at pp. 9767; 9792-9793), its findings about the necessity for restraints should not be disregarded years later by a federal court.

The incorrect resolution of this issue is error that transcends this case. The published opinion of the Court of Appeals sends a clear messsage to all trial courts in California and other states within the jurisdiction of the Ninth Circuit that its factual conclusions about the need for security are subject to discretionary reappraisal in hindsight. Furthermore, as we explain in part B, *infra*, the applicable legal standard articulated by the Court of Appeals is erroneous at best, incomprehensible at worst. The Court of Appeals' willingness to disregard factual findings and its application of an inappropriate legal

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[5]We discuss the appropriate legal standard in part B, *infra*.

standard place at risk every conviction from a trial in which the trial court concluded that the use of security was a necessity. The major systemic damage from the opinion of the Court of Appeals may haunt the state courts of this circuit indefinitely.

- B -

(1)

In *Illinois v. Allen*, 397 U.S. 337 (1970), this Court stated in dictum "that no person should be tried while shackled and gagged except as a last resort." *Id.* at p. 344. From this broad dictum, the Court of Appeals and other federal and state courts have extrapolated the following propositions: (a) shackles should be used only in cases of manifest necessity; (b) the use of physical restraints is the most restrictive method of maintaining courtroom security; and (c) if other "less restrictive

alternatives" are available, they should be employed. (App. A at pp. 9757-9758; *Wilson v. McCarthy*, 770 F.2d 1482 (9th Cir. 1985); *Tyars v. Finner,* 709 F.2d 1274 (9th Cir. 1983); *People v. Duran*, 16 Cal.3d 282, 545 P.2d 1322 (1976).) We do not quarrel with the requirement that a trial court must justify the use of shackles with specific reasons. But we ask this Court to reject the subsidiary proposition that shackling is *always* that most restrictive alternative and must be eschewed if a "less restrictive alternative" is available. Trial courts must determine the need for security on the basis of the facts of which they are aware. The rigid legal principle which requires the "least restrictive alternative" under all circumstances unduly restrains trial courts in balancing the competing concerns of courtroom safety and the right to a fair trial.

Several reasons support this position. First, implicit in the concept of judicial discretion is the premise that more than one resolution of an issue may be acceptable. If the trial court must use the least restrictive form of courtroom security, it has no discretion. It must select the "right" form of protection upon peril of reversal. We believe that the Constitution requires only that valid reasons must exist to justify the type of security which is ultimately adopted. To be sure, the court must *consider* all potentially viable possibilities, whose existence informs the court's discretion. But a form of security, even the use of chains, which the trial court justifies with record evidence, does not violate due process because hindsight suggests that an alternative might have been available.

Second, the argument that shackling is the most restrictive form of security is valid only if shackling

necessarily and invariably is the most prejudicial to the right to a fair trial. (*See* App. A at p. 9759.) But if another, arguably less physically intrusive alternative actually poses a greater threat to an accused's rights to a fair trial, then the "least restrictive alternative" methodology must be rejected.

This case presents damning evidence of the invalidity of this methodology. The Court of Appeals held that banishment from trial for 17 months was "less restrictive" than the use of shackles. This conclusion is astonishing. The presence of a defendant is essential if his absence might frustrate the fairness of the proceedings. *Faretta v. California,* 422 U.S. 806 (1975). Respondent's absence would have called attention to him, an attention that would have intensified when he was required to appear in court -- in chains -- to facilitate his identification by

witnesses. Cal.Pen. Code § 1043. His absence (a) would not have negated juror prejudice, for there was none (*see* C, *infra*); (b) would have exacerbated, not mitigated, his difficulties in assisting in his own defense because he would not have been present to hear the evidence; and (c) would not have improved the dignity and decorum of the proceedings because four chained defendants would have remained. Absence during a 17-month trial, involving dozens of witnesses and hundreds of exhibits, simply was not a realistic alternative to shackling. The need for respondent to be in court to confront the witnesses and assist his attorney was absolute.

(2)

Under any constitutional standard, the burden was upon respondent, and is upon all criminal defendants who are properly subject to restraint, to assist the trial court in

the selection of the most appropriate form of restraint. Such a requirement (a) will give the defendant a sense of participation in determining the procedures governing the trial; (b) will guide the trial court in choosing the mode of security which is the most comfortable physically and the least disruptive to the presentation of the defense; and (c) will usually foreclose, or at least minimize, the issue on appeal. Refusal to cooperate will serve as a bar to any claim that the trial court failed to select the most appropriate alternative. *See Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *United States v. Frady*, 456 U.S. 152 (1982); *Murray v. Carrier*, 477 U.S. 478 (1986); *Smith v. Murray*, 477 U.S. 527 (1986). The Court of Appeals not only creatively suggested preferable alternatives to the restraint actually used at trial almost 15 years after the trial ended, it made those

alternatives nonwaivable. This holding, in conflict with *Estelle v. Williams*, 425 U.S. 501 (1976), undermines the strong policy arguments in favor of participation by the accused.

If, as we argue, a defendant must assist in the selection of the most appropriate form of security, then he also has the burden of establishing on appeal or habeas corpus that the trial court erroneously rejected his suggestions. (*Compare* App. A at p. 9757 n.12 *with id.*, at pp. 9791, 9793.) In the context of the present case, respondent was required to show that he proposed more appropriate alternatives, a requirement which he was totally unable to satisfy. Respondent did not timely or seriously request the alternatives suggested by the majority: (a) reduction of the number of shackles; (b) banishment from the court; or (c) absence on days when respondent

did not feel well enough to attend. His failure to propose an alternative short of complete unshackling constitutes a waiver of this issue. *See Estelle v. Williams, supra.*

(a)

Respondent categorically rejected any consideration of "some easement in restraint, short of total unshackling of all defendants. . . ." (SRT 2994.) The majority speculates that the trial court "could have rejected [respondent's] position and reduced the number of the chains by concluding that Spain's constitutional right to a fair trial so demanded." (App. A at p. 9773 n.21.) This suggestion implies that certain rights are unwaivable, a position which flies in the face of a decade of Supreme Court decisions to the contrary. *Wainwright v. Sykes, supra,* 433 U.S. 72.

Perhaps more importantly, respondent's cooperation was essential to determine the degree of restraint he could

tolerate. If the court had chosen to remove some of the chains, it had to know whether it was acceptable to respondent. Without the cooperation of respondent the trial court could only guess.

(b)

We next turn to the centerpiece of the Court of Appeals' decision:

> "We conclude that Spain gave the trial judge the option of excluding him from trial. Exclusion from trial would have been a less restrictive alternative." (App. A at pp. 9772-9773.)

Respondent did not in fact "[give] the trial judge the option of excluding him from trial." On April 11, 1975, during impanelment of the jury, respondent moved to waive personal presence. Upon careful inquiry by the court at a hearing on the scope of the waiver, it became apparent that respondent wished to "waive his presence on selected days when he was not feeling well." (App. A at

p. 9772 n.18.) The Court of Appeals incomprehensibly transformed this limited request into a blanket waiver.

It must be emphasized that respondent had rejected the "less restrictive" alternative of fewer chains, apparently to maintain the appearance of solidarity with his codefendants. In view of that decisive rejection, the trial court could not rationally conclude that respondent truly desired the *more* drastic alternative of banishment, which erased the image of solidarity with his co-defendants and made it more difficult for respondent to participate in his own defense. Finally, the removal for 17 months of a black man from his trial for the murders of five white men would have cast grave doubt about the availability of a fair trial to California's minority citizens.

Banishment simply was not a realistic alternative. The holding of the Court of Appeals on this issue

illustrates the fallacy of the proposition that other means of security are invariably preferable to shackling. The supposedly "less restrictive alternative" of banishment would have jeopardized respondent's right to a fair trial far more than shackling.

(c)

We address the last suggested alternative of the Court of Appeals:

> "[T]he court might have allowed Spain to be absent on selected days when he was not feeling well." (App. A at p. 9773; fn. omitted.)

The short answer is that respondent did not allege during the presentation of the evidence to the jury that he was unable to attend. If he had done so, the trial court would have had to grant a continuance or accept a waiver of appearance because California law forbids the trial of a defendant who is physically unable to appear and does

not waive his presence. *See, e.g., People v. Berling*, 115 Cal.App.2d 255, 251 P.2d 1017 (1953). Respondent did not raise this issue in his state appeal or in his federal habeas petition. The Court of Appeal may not now do it for him. *Wainwright v. Sykes, supra.*

On April 11, 1975, the trial court correctly ruled under state law that respondent could be excused from attending pretrial matters (Cal.Pen. Code § 977), but that his appearance was mandatory during trial. *Ibid.* The court did *not* rule that respondent could not remain in prison if he was too ill to attend. Respondent's motion to be absent was premature because he requested to be excused from personally appearing *if* "he was not feeling well," on "selected days." The granting of this motion would have given him *carte blanche* to come and go as he pleased. The Constitution requires no such arrangement,

especially when a timely motion during the course of the trial served equally well. Until respondent made such a motion, the trial court was surely entitled to accept the finding of District Court Judge Zirpoli that respondent was in "good physical condition" (*Spain v. Procunier*, 408 F.Supp. 534, (N.D.Cal. 1976), *aff'd in part, rev'd in part* 600 F.2d 189 (9th Cir. 1979) (Kennedy, J.) and his ruling that shackling might be a permissible form of restraint. (SCT 2612-2613.)

-C-

Lastly, we consider the impact of the use of the shackles upon the reliability of the fact-finding process. In this regard we recite the reasons advanced by the Court of Appeals and other authorities which militate against the use of shackles: reversal of the presumption of innocence; impairment of mental faculties; impediment to

communication between defendant and attorney; detraction from the dignity of the proceedings; and infliction of pain upon the defendant. (App. A at pp. 9756-9757; *see Holbrook v. Flynn*, 475 U.S. 560, (1986); *Illinois v. Allen, supra,* 397 U.S. at p. 344; *Zygadlo v. Wainwright,* 720 F.2d 1221 (11th Cir. 1983), *cert. denied,* 466 U.S. 941 (1984).) Some of these considerations are factually not relevant to this case or constitutionally not cognizable at all.

The five shackled defendants were acquitted on 39 of the 45 counts alleged against them; respondent himself was acquitted on four of seven counts charged against him. It is clear that the jury was not prejudiced against respondent; in any event, the majority's conclusion that "the greater the intensity of shackling and the chains'

visibility to the jurors, the greater the extent of prejudice" (App. A at p. 9759) is factually unsupported.

Turning to the "dignity and decorum of the judicial proceedings," we respectfully suggest that, in the abstract, they are irrelevant concerns to a federal court which is reviewing a state conviction. The decorum of a state court proceeding is relevant only to the extent that it may bias the jury against the defendant. We have explained in the preceding paragraph that no such bias existed.

The pain that the shackles cause is assuredly a relevant concern, but it is misleading to isolate pain as an independent consideration. If a defendant is in pain but able to cooperate with his attorney and participate in his own defense, then his physical discomfort, even if extreme or unnecessary, is not an independent basis for the grant of habeas relief.

Finally, the impact of shackles upon the defendant's mental faculties and ability to communicate with his attorney must be viewed in a larger context. If a defendant receives a spirited and aggressive defense despite the use of restraints, then the fact-finding process has not been compromised. *Cf. Strickland v. Washington*, 466 U.S. 668 (1984).

Judged in this light, respondent's trial comported with due process.

The acquittal by the jury on 39 of the 45 crimes charged against the shackled defendants is irrefutable evidence that the restraints did not reverse the presumption of innocence in the eyes of the jurors. These verdicts disproved respondent's bald claims of prejudice at his subsequent evidentiary hearing.

Respondent acknowledged at his evidentiary hearing that he was physically able to testify at trial, but declined to do so, believing that the jury would not have believed the testimony of a chained witness. (ER 361.) His decision not to testify for that reason constituted a waiver of this issue. *See Luce v. United States*, 469 U.S. 38 (1984).

It is vital to realize that respondent was not defenseless at trial. He presented evidence which covers over 2,000 pages of transcript. His attorney constructed a defense of diminished capacity through the testimony of psychiatrists who based their opinion that he lacked mental capacity upon his out-of-court, unsworn, unchallenged statements to them. Thus, he was able to present his version of the events without enduring the

cross-examination of the prosecutor about a number of embarrassing subjects.

We contend that respondent waived his claim that the restraints affected his defense. At his 1985 evidentiary hearing, counsel for petitioner asked respondent how his defense would have been more effective, or at least different, if he had been unchained. Respondent objected to the question, an objection which was sustained by the magistrate. (CR 53-54, 60.) Respondent had requested that hearing to present evidence of the impact of the shackles upon his ability to participate in the preparation of his defense, but refused to address the ultimate issue: how the restraints affected his defense and therefore the reliability of the fact-finding process. Under these circumstances, his evidence that the chains affected him physically is beside the point.

The fact is that respondent received a fair trial. The jury disregarded the chains in determining guilt. Respondent could have testified but chose not to do so. His attorney, who was able to confer with respondent literally hundreds of times (SRT 3976-3979; ER 292-293), presented a vigorous defense. No evidence exists that a better or different defense could have been presented if the shackles had been removed. There was no denial of due process. *Cf. Strickland, supra.*

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

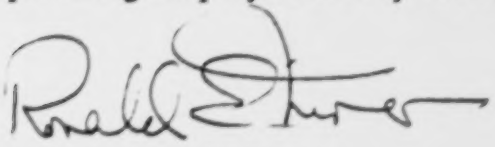
DATED: January 25, 1990

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

RICHARD R. IGLEHART
Chief Assistant Attorney General

JOHN H. SUGIYAMA
Senior Assistant Attorney General

MORRIS BEATUS
Supervising Deputy Attorney General



RONALD E. NIVER
Supervising Deputy Attorney General

Attorneys for Petitioner

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHNNY SPAIN,
Petitioner-Appellee,
v.
RUTH L. RUSHEN, Director, California Department of Corrections,
Respondent-Appellant.

No. 86-2687
D.C. No. CV-81-4858-TEH
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
March 14, 1988—San Francisco, California

Withdrawn from Submission November 18, 1988
Resubmitted December 22, 1988

Filed August 22, 1989

Before: Cynthia Holcomb Hall, Alex Kozinski and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Noonan

SUMMARY

Constitutional Law

Affirming the district court's grant of a writ of habeas corpus, the court held that failure to use shackling of a defendant

as a "last resort" when less restrictive and yet no less beneficial alternatives are available, violates due process.

Appellee Johnny Spain, a member of the Black Panther Party, was serving a life sentence for first degree murder when he was transferred to the San Quentin Prison Adjustment Center, primarily used to segregate and discipline disruptive prisoners. On August 21, 1971, there was an outburst of violence at the Adjustment Center after George Jackson, another inmate and Black Panther member, pulled a gun from under his wig and forced a guard to open all the cells. There was testimony that Spain helped bind the guards and at one point held Jackson's gun used to murder two guards. When Jackson and Spain fled the adjustment Center, Jackson was killed but Spain was found hiding in the bushes. In a trial with five other prisoners, Spain was found guilty of two counts of first degree murder and of conspiracy to escape by force or violence. In the courtroom, Spain was shackled, wearing leg irons, a waist chain to which each of his hands was bound and chains that apparently held him to his chair. Spain was sentenced to another term of life imprisonment, and in 1982 was granted a writ of habeas corpus. The district court on remand sent the case to a magistrate to determine what effect Spain's shackling during the trial had on his ability to cooperate with his trial attorney and to testify in his own defense. The district court adopted the magistrate's findings of fact, determined that Spain's due process right to a fair trial was violated by being shackled at trial and issued a second writ of habeas corpus. Appellant Rushen appealed the issuing of the second writ.

[1] In *Anderson v. Bessemer City*, 470 U.S. 564 574, 575 (1984), the Supreme Court warned courts of appeal not to reverse the finding of the trier of fact simply because the court is convinced that it would have decided the case differently. [2] In this case the magistrate considered medical reports including Spain's medical history and prison medical records, and the live testimony of Spain, Spain's counsel, and

two experts in psychology. The magistrate did not accept each witness' testimony uncritically, and [3] there is no basis for disturbing the evidentiary report. Spain's story is coherent and facially plausible. It is not implausible that a man shackled with 25 pounds of chains ten to twelve hours a day for almost five years would experience debilitating pain and degradation. [4] A cumulation of factors provided the trial judge with ample justification for taking some sort of action to protect the courtroom personnel, the spectators, the defendants and himself. On trial were six men, already serving time for committing acts of extreme violence and accused of perpetrating one of the bloodiest prison escapes of all time. Adding to the judge's concern was the potentially explosive political atmosphere surrounding the trial and a previous courthouse shoot-out involving Spain's accomplice Jackson that left three men dead including the presiding judge. [5] The Supreme Court has provided that, faced with a contumacious defendant, the trial judge has at least constitutionally permissible options. He may bind and gag the defendant, cite him for contempt, or take him out of the courtroom until he promises to behave himself. [6] The option of binding and gagging the defendant should be used only as a last resort. [7] Because of the problems accompanying the decision to shackle, the trial judge must pursue less restrictive alternatives before imposing physical restraints, weighing the benefits and burdens of shackling against other alternatives. [8] When an accused is forced to appear before his peers in chains, the presumption of innocence is seriously jeopardized. [9] The greater the intensity of shackling and the chains' visibility to the jurors, the greater the extent of prejudice. The trial judge was powerless to conceal the defendants' chains, and thus shackling Spain in this manner exposed him to a serious threat of prejudice. [10] Another inherent danger in shackling is the possibility that defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties. The magistrate found that the subject of shackles practically consumed Spain's attention and significantly detracted from

Spain's ability to prepare for his own defense. [11] According to the magistrate's findings, the chains grossly interfered with Spain's ability to cooperate with counsel. [12] The dignity and decorum of the judicial proceedings could hardly have been disrupted more than they were in the present case. [13] A high cost of shackling is the pain imposed and the consequential burden placed on the mind and body of the defendant. [14] Spain repeatedly voiced his complaints of pain which were corroborated by uncontested medical reports. [15] The trial court never really considered the alternatives to shackling the defendants in order to secure the courtroom. [16] Citing Spain for contempt would have been meaningless, but the same cannot be said of excluding him from trial. [17] Although the accused has a well established right to be present at his own trial, [18] removing the defendant from trial may be a permissible option in some certain cases. [19] On several occasions, Spain raised the possibility of being absent from trial through requests and [20] a handwritten affidavit, but the court, after conducting a hearing, concluded that Spain might be excused from personally appearing during pretrial matters, but not during jury selection or the trial. [21] Spain gave the trial judge the option of excluding him from trial, a less restrictive alternative, but the court failed to explore this possibility. [23] Consequently, the trial judge committed constitutional error in failing to employ shackling as a last resort. [24] This failure deprived Spain of his right to due process.

Judge Noonan dissented in a separate opinion, stating that in extraordinary circumstances charged with danger, the trial court balanced the risks against the harms and made a fair balance that one federal judge found damaged neither the physical health of Spain nor his right to access to the courts nor his right to counsel. The court has no authority to second-guess the procedure chosen and to overturn a verdict of murder fairly rendered thirteen years ago.

COUNSEL

Ronald E. Niver and John H. Sugiyama, San Francisco, California, for the respondent-appellant.

Dennis Riordan, Riordan & Rosenthal, San Francisco, California, for the petitioner-appellee.

OPINION

HALL, Circuit Judge:

Ruth Rushen, Director of the California Department of Corrections, appeals from the district court's grant of a writ of habeas corpus to Johnny Spain. Rushen contends that the district court erred in determining that the state trial court violated Spain's constitutional rights by shackling Spain during his criminal trial. We affirm.

I

In 1971, Johnny Spain was imprisoned in San Quentin Prison and was a member of the Black Panther Party.[1] Spain was serving a life sentence for a 1967 conviction for first degree murder. In May of 1971, Spain was transferred to the Adjustment Center at San Quentin, a three-story structure

[1]The Black Panther Party was a revolutionary group founded in 1966 in Oakland, California that reached its peak by the early 1970s. The group adopted a platform calling for, among other things, the arming of all blacks, the release of all blacks from prison, and the trial of blacks by all-black juries. The platform also stated, "We will protect ourselves from the force and violence of the racist police and the racist military by whatever means necessary." R. Major, A Panther Is a Black Cat 285-88 app. A (1971); D. Schanche, The Panther Paradox: A Liberal's Dilemma 88-90 (1970). Throughout the Party's history, its members were involved in numerous violent altercations with police. *See* R. Major, *supra*, at 296-302 app. E.

primarily used to segregate and discipline disruptive prisoners.

On August 21, 1971, there was an outburst of deadly violence at the Adjustment Center. George Jackson, also a member of the Black Panther Party, returned to the Adjustment Center after meeting with his lawyer, Stephen Bingham. When guards found a bullet clip on Jackson, Jackson removed a gun from under his wig and forced one of the guards present to open the cells of other prisoners. Many of the prisoners, including Spain, emerged from their cells. There was testimony that Spain played a role in binding guards and placing them in the cells where they subsequently were assaulted. He was seen approaching the guards with an earphone cord in his hands. The cord was of the type used to bind the guards. There also was testimony that at one point he held Jackson's gun, which was used to murder two of the guards.

When an alarm was sounded, Jackson and Spain fled from the Adjustment Center, Jackson with a gun in his hand and Spain with some keys. Jackson was shot by guards and was killed instantly. Spain dove into some bushes where he was found hiding. When order was restored the aftermath of the violence was revealed: one officer had bled to death from a neck wound; two had been shot to death in the head; three others had their throats slashed, but survived; and two prisoners died of similar wounds. The Director of Corrections called the incident the worst in her eight years as Director.

Officials found a number of weapons and knives in their subsequent search. In Spain's back pocket, officials found a six inch long vial wrapped in tape, which Spain identified as an explosive. A search of Spain's cell revealed a road map with an escape route and, hidden inside bars of soap, thirteen rounds of .38 caliber ammunition, four .410 gauge shotgun shells, and one .22 caliber magnum shell.

Spain was charged with five murder counts, one conspiracy count, and one assault count. The prosecution attempted to show that the Black Panther Party had organized the escape attempt and that Spain was linked to the conspiracy by his membership in the Black Panthers. Spain did not testify; his defense was that he could not recall anything from the time his cell door opened to the time he ended up outside the Adjustment Center.

In a trial with five other prisoners, Spain was found guilty of two counts of first degree murder and of conspiracy to escape by force or violence; he was acquitted of the other four counts. In the courtroom during the trial, Spain was shackled. He wore leg irons, a waist chain to which each of his hands was bound by individual chains about eight inches long, and chains that apparently held him to his chair.[2] Spain, already

[2]A neck chain was applied during transportation to and from prison. It is unclear whether Spain wore this neck chain before the jury.

At argument, Spain's counsel said he had no recollection that the neck chain was used in view of the jury, although it was used for transportation and at certain pretrial proceedings. On January 11, 1974, Lt. Campbell, a security officer for the California Department of Corrections, described for the court the restraints that were in place in the courtroom. He explained that the neck chain was removed once the defendant was in his seat in the courtroom and that the neck chain was used to lock the leg irons chain to the base of the chair. On cross-examination, Spain's counsel did not challenge this account.

The magistrate who held an evidentiary hearing on the effect of the shackling did not resolve this factual matter. The magistrate recognized that the photographs Spain introduced showed him in the courtroom without the neck chain, but with two added chains: one that attached his leg irons to the base of the chair, and one around Spain's waist that attached to the back of the chair. This is consistent with the testimony of Lt. Campbell on the use of the neck chain in the courtroom. Spain testified that the photograph showing him with leg shackles, the waist chain, a chain connecting the leg shackles to the base of the chair, and another chain connecting his waist to the back of the chair, but without the neck chain, depicted basically the same chains he wore during trial. However, he also testified

serving a life term for murder, was sentenced to another term of life imprisonment in 1976.

On June 29, 1982, the District Court for the Northern District of California issued Spain a writ of habeas corpus because it determined that Spain's constitutional rights were violated by *ex parte* communications between the trial judge and a juror. *Spain v. Rushen*, 543 F. Supp. 757 (N.D. Cal. 1982), *aff'd mem.*, 701 F.2d 186 (9th Cir.), *vacated*, 464 U.S. 114 (1983). Although a challenge to the constitutionality of Spain's shackling was raised in his habeas petition, the district court did not reach that issue. We affirmed the district court in an unpublished decision. 701 F.2d 186. The Supreme Court reversed and vacated the judgment, 464 U.S. 114, and noted that Spain's argument that his constitutional rights were violated when he was shackled was to be resolved on remand, *id.* at 117 n.1. On remand, the district court referred the case to a magistrate for an evidentiary hearing to determine the effect Spain's shackling during the trial had on his ability to cooperate with his trial attorney and to testify in his own defense. The magistrate made the following findings of fact:

> 1. Petitioner's shackling at trial aggravated his existing medical and psychological problems, and pained and preoccupied him during that time.
>
> 2. Petitioner's shackling interfered with his ability to communicate with his trial counsel and to participate in the preparation of his own defense.

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that the neck chain was removed while in the holding cell, but it was "reapplied in the courtroom itself."

Nor did the district court resolve this dispute. Nevertheless, we need not remand for a finding of fact because the resolution of this dispute does not affect the result in this case.

3. Petitioner's shackling impeded his ability to testify on his own behalf.

Evidentiary Report at 6-7, *Spain v. Rushen*, No. C-81-4858 TEH (JSB) (N.D. Cal. Oct. 9, 1985) [hereinafter Evidentiary Report]. The district court virtually adopted these findings,[3]

[3]Spain and other inmates housed in the Adjustment Center (AC) at San Quentin prison filed a section 1983 action claiming that their confinement and treatment at the AC infringed upon their constitutional rights. 408 F. Supp. 534, 537 (N.D. Cal. 1976), *modified in part, affirmed in part, and reversed in part*, 600 F.2d 189 (9th Cir. 1979). This action overlapped with Spain's state court criminal trial. The district court focused exclusively on the impact of the internal functioning of the AC on the plaintiffs, *id.* at 537, 538, stating emphatically: "All that the court is now called upon to decide is the constitutionality of the length and conditions of their confinement and treatment at the AC," *id.* at 539. In so doing, the court reviewed "the physical plant of the AC and its cells, noise levels, heating and ventilation, exercise, discipline, use of tear gas, use of restraints, medical care and attention, diet, clothing, hygiene, access to counsel, access to the media, and visitor and mail privileges and procedures." *Id.* at 538. Judge Zirpoli himself inspected San Quentin, paying particular attention to the conditions of the AC. *Id.*

The district court held that "the abhorrent and shocking use of excessive restraints in the combined form of hand manacles, waistbelt, leg chains, and neck chains for *all* of plaintiffs' out-of-prison movements constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States." *Id.* at 545 (footnotes omitted). The court, however, rejected plaintiffs' first and sixth amendment claims that the prison conditions at the AC denied them access to the effective assistance of counsel, to the courts and to the media, invaded their privacy, and deprived them of medical care and adequate nutrition. *Id.* at 546. The court concluded that these claims "are not of such constitutional dimensions as to justify intervention by a federal court." *Id.* Upon rejecting the plaintiffs' first and sixth amendment bases for section 1983 relief, the court, apparently referring to the quality of medical care and nutrition, noted that the "[p]laintiffs were found to be in good physical condition." *Id.*

The dissent seizes upon this finding in an attempt to circumvent the district court's findings below. This attempt is futile. The dissent's first error is to substitute its own factual determinations for those of the district court

Spain v. Rushen, No. C-81-4858 TEH, at 5 (N.D. Cal. Sept. 22, 1986), determined that Spain's due process right to a fair trial was violated by being shackled at trial, and issued a second writ of habeas corpus.[4] From this writ, Rushen appeals.

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in this habeas action. The dissent thus improperly assesses the credibility of Spain's testimony. *Post*, at 9786-87. The dissent compounds this error with yet another: it fails to acknowledge the critical distinction in the inquiries facing Judge Zirpoli and the district court below. It is this failure that causes the dissent erroneously to perceive inconsistency in the findings of the district judges.

Judge Zirpoli examined only the question whether the conditions *inside the prison* infringed upon Spain's constitutional rights to require relief under section 1983. He did not even purport to address whether the excessive chaining *inside the criminal courtroom* deprived Spain of a fair trial. In fact, Judge Zirpoli recognized the different concerns involved in the state criminal trial, as indicated by his modified order halting the use of shackles in the AC, which specifically "[did] not apply to state trial proceedings in the courthouse and courtroom of Marin County." This recognization is also evident in his finding that "[t]hough the evidence reveals incidents which have resulted in an invasion of plaintiffs' right of privacy in their attorney-client relationship . . ., no *pattern* emerges which necessitates injunctive relief." 408 F. Supp. at 546 (emphasis in original). We see no irreconcilable inconsistency between Judge Zirpoli's general finding of good health and the more specific finding in this case that Spain suffered from back problems severe enough to cause him great discomfort when he was required to wear twenty-five pounds of chain ten to twelve hours a day for five years.

Indeed, Judge Zirpoli's findings dovetail neatly with the district court's findings in this case. Upon concluding that the excessive chaining constituted cruel and unusual punishment, Judge Zirpoli stated that "[m]anacles, shackles, waistbelts, leg and neck chains are painful devices which inflict corporal punishment on those wearing them. They engender pain, humiliation, rage, and resentment . . . ." *Id.* at 545 n.15. The district judge then noted: "The cruel and unusual character of the punishment resulting from the combined restraints employed was clearly evident from the court room demonstration in the course of the hearings in this case." *Id.* This last observation, in particular, disposes of the dissent's attempt to avoid the consequences of the district court's findings in this habeas action.

[4]In attacking the underlying factual basis for granting the writ, the dissent asserts that Spain had a "full opportunity to challenge [before Judge

II

We review de novo the district court's decision to grant a petition for writ of habeas corpus. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 198 (1987).

A

Generally, a criminal defendant has a constitutional right to appear before a jury free of shackles. *See Wilson v. McCarthy*, 770 F.2d 1482, 1484 (9th Cir. 1985). However, a trial judge's decision to shackle a defendant is not per se unconstitutional. *Stewart v. Corbin*, 850 F.2d 492, 497 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1737 (1989). "The trial court has discretion to use shackles or other security measures when circumstances dictate." *Wilson*, 770 F.2d at 1484. Thus, we review for an abuse of discretion a trial judge's deci-

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Zirpoli] the conditions to which he was subject at the time." *Post*, at 9787. The plain suggestion is that Judge Zirpoli was fully empowered to enjoin the state trial court from chaining Spain.

However, this ignores fundamental principles of comity and federalism, which were forcefully espoused in *Younger v. Harris*, 401 U.S. 37, 46 (1971) (underscoring "the fundamental policy against federal interference with state criminal prosecutions"). *See also Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1981). Under *Younger*, a federal court should abstain if, at the time the plaintiff initiated the federal action, (1) a state judicial proceeding was ongoing; (2) that proceeding implicated important state interests; and (3) the proceeding presented an adequate opportunity to raise constitutional challenges. *DeSpain v. Johnston*, 731 F.2d 1171 (5th Cir. 1984) (citing *Middlesex Ethics Comm.*, 457 U.S. at 432). Hence, the *Younger* doctrine would have placed before Spain a virtually impenetrable barrier to challenge in federal court the manner in which the state court conducted its criminal proceeding. *See Mann v. Jett*, 781 F.2d 1448, 1449 (9th Cir. 1986) (abstention appropriate in 1983 action where plaintiff could "adequately litigate in the ongoing state criminal proceedings his underlying claim of unconstitutional deprivation of counsel").

sion to shackle a defendant. *Stewart*, 850 F.2d at 497-98; *Wilson*, 770 F.2d at 1485.[5]

B

As mentioned, the district court below adopted the magistrate's factual findings. Before we can determine whether the trial court abused its discretion, we must first examine these findings, which are reviewed for clear error. Fed. R. Civ. P. 52(a).

Rule 52(a) provides: "Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Because in this case the findings in large measure depend on credibility determinations, we must accord particularly wide-ranging latitude, or "special deference," to the district court. *See Anderson v. Bessemer City*, 470 U.S. 564, 574, 575 (1984).

[1] In *Anderson*, the Court sent a clear message to the courts of appeals warning us not to "reverse the finding of the trier of fact simply because [we are] convinced that [we] would have decided the case differently." *Id.* at 573. This is a principle we "must constantly have in mind." *Id.* (quoting *Zenith*

[5]The dissent recognizes that *Wilson* unequivocally sets forth an abuse of discretion standard. See *post*, at 9776. Nevertheless, the dissent proceeds to assert that *Stewart* has "liberated" us from this purportedly incorrect phrasing of the standard. This is derived from *Stewart's* admonition that the "[i]ssue . . . is not whether in retrospect, the trial court could have handled the matter better, but rather, whether the trial court denied appellant a fair trial under the circumstances." 850 F.2d at 497.

However, the quoted language is consistent with the abuse of discretion standard; that language only clarifies the standard in the context of a trial court's decision to impose shackles. That is, federal courts are not to find an abuse of discretion merely by second-guessing state trial courts. Indeed, *Stewart* stated that the balancing of competing interests "is left to the *discretion* of the trial court." *Id.* at 499 (emphasis added).

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969)). And

> when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 575.

[2] We believe that the emphatic sentiments expressed in *Anderson* command us to accept the district court's findings. The magistrate considered medical reports, which included Spain's medical history and his prison medical records, and the live testimony of Spain, Charles R. Garry (Spain's counsel), and two experts in psychology. In considering the live testimony, the magistrate did not accept each witness's account uncritically. Compare *Henson v. CIR*, 835 F.2d 850 (11th Cir. 1988). She properly discounted the weight of the witnesses' testimony as appropriate.

Spain called Dr. Delman, a psychologist, and the state called Dr. Sutton, a psychiatrist, in an attempt to reconstruct Spain's state of mind during the trial. The magistrate provided the following background:

> Dr. Delman . . . has seen Spain four times in the last couple of years, each interview spanning 2-3 hours. Delman did not interview anyone other than Spain, his friends, and supporters. Although Delman did review Spain's prison psychiatric file, Delman did not speak to any correctional officers, prison officials, or persons involved in Spain's prosecution. Delman's opinion was that "Spain was so depressed and pessimistic and beaten by the chains,

> that I don't believe he was capable of cooperating [in his defense] in a reasonable way."
>
> Dr. Sutton [is] a staff psychiatrist at San Quentin .... Sutton examined Spain before and at the time of trial. She testified that she saw Spain on "several occasions," but one of those occasions was a group interview with three of his co-defendants. Moreover, Sutton had no recollection of speaking with Spain when he was in shackles or discussing the subject with him.

Evidentiary Report, *supra*, at 6-7. The magistrate then concluded that the value of the experts' testimony was "limited." *Id.* at 7. She did not indicate, however, that this testimony would be dismissed entirely.

The magistrate also commented about the testimony of Garry. She found some of his testimony "marked by hyperbole" and his recollection of the events hazy at times. *Id.* at 6-7. Accordingly, the magistrate did not give it "substantial weight." *Id.* But nor did she dispense with his testimony altogether. For example, the magistrate found exaggeration in Garry's assertion that "there was no way in the world I could communicate with [Spain]." *Id.* at 10 (quoting Garry's testimony). However, she then concluded that "Garry's statement that 'more than three-quarters of ... [their time together] was [spent] talking about how he was being treated ... how degraded he felt [when he walked into the courtroom]' [was] probably close to the truth." *Id.* (quoting Garry's testimony).

Spain testified at length before the magistrate. His testimony spanned more than 100 pages of transcript. He claimed to have experienced great physical and mental pain during both the pretrial proceedings and trial. He explained:

> I could feel the pain before the chains were ever applied, and that is an hour or two hours before

> these chains were put on. I could feel those chains and the pain of it, two and three hours after they were removed when we returned to the prison. And in terms of pain, we are talking about 14 and 15 hours a day of having to deal with this. That consumed every aspect of my life at that point.

Spain claimed that the pain impeded his ability to concentrate on the trial proceedings. The issue of pain was relevant not only to Spain's ability to participate at trial and cooperate with his counsel, but also to Spain's decision not to testify at trial. Spain later testified about the effect the chains had on this decision. On redirect examination, Spain's attorney attempted to introduce the testimony Spain had given years earlier before Judge Zirpoli, the federal district judge in the 1983 action, and the government objected on relevancy grounds. The magistrate overruled the objection and admitted the evidence, explaining: "Well, it seems to me there is a certain amount of relevance with regard to the issue before me in the mere fact he testified before Judge Zirpoli when he was not shackled."[6]

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[6]The magistrate's basis for admitting Spain's former testimony indicates that she considered this evidence insofar as it was pertinent to Spain's decision not to testify. The dissent overstates the importance of this evidence to the magistrate's findings:

> For hard evidence as to the effect of the chains on Spain's health and on his ability to communicate with Garry and prepare his defense, the magistrate relied on Spain's own declaration in connection with his earlier habeas corpus petition and his testimony before Judge Zirpoli in that proceeding.

Post, at 9785. The dissent then draws the following conclusion: "Spain's declaration and testimony in that proceeding are indeed the chief basis for the findings in the present case." *Post,* at 9785. This is unsupportable. Apart from the magistrate's expressed understanding of the relevance of this evidence, this part of Spain's testimony occupied but five pages of a transcript that numbered more than 100 pages. Finally, the magistrate in no way suggested in her evidentiary report that she placed such emphasis on Spain's former testimony. The magistrate cited Spain's statements before Judge

In assessing the veracity of Spain's complaints of experiencing disruptive pain and humiliation during trial, the magistrate apparently factored in the extent and duration of the chaining as well. The magistrate devoted an entire section to this subject, methodically detailing the type, number, and weight of the chains Spain wore and for how long. Of course, this is a reasonable consideration. The truthfulness of Spain's complaints must be gauged by the circumstances he suffered.

[3] After thoroughly reviewing the magistrate's evidentiary report, we find no basis for disturbing her findings, having accorded them appropriate deference. Spain's story is "coherent and facially plausible." *Anderson*, 440 U.S. at 575. It is not implausible that a man shackled with 25 pounds of chains ten to twelve hours a day for almost five years would experience debilitating pain and degradation. Indeed, the government concedes that Spain's "physical ailments [were] . . . painful," and only disagrees with the magistrate's conclusion that the pain was debilitating. Brief of Appellants 46; *see also id.* at 38-39. Nor is Spain's story "internally inconsistent" or "contradicted by extrinsic evidence." *Anderson*, 440 U.S. at 575.[7] All this is not to say that were we the magistrate we

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Zirpoli *only to establish his preoccupation with the subject of shackles.* Evidentiary Report, *supra*, at 8-9. The two citations are but facts showing that Spain was preoccupied. The magistrate adverted to other indications of preoccupation: Spain undertook a course of study of the history of shackling, and Spain focused first on his shackling in his personal statement to the sentencing court. *Id.* at 9. The government acknowledges this: "Appellant does not dispute the existence of the foregoing facts, for the record does establish that appellee complained about his restraints." Brief of Appellant at 38. Instead, the government disagrees that "the evidence proves an obsessive distraction which prevented petitioner from participating in his own defense." *Id.* The dissent also acknowledges Spain's preoccupation with the shackles: "What is most apparent in Spain's deeply felt and continuing complaint about the chains is that he perceived them as an affront to his dignity as a human being." *Post*, at 9794.

[7]The dissent asserts that Judge Zirpoli's findings in the section 1983 action contradict the district court's adopted findings below, *post*, at 9786,

would have made the same findings. But what we might have done or not have done as factfinders does not matter. *Id.* at 573. Our inquiry is of a different order.

III

[4] A cumulation of factors, not just any single one, provided the trial judge in the case at bench with ample justification for taking some sort of action to protect the jury, the courtroom personnel, the spectators, the defendants, and himself. *See Zygadlo v. Wainright*, 720 F.2d 1221, 1223 (11th Cir. 1983), *cert. denied*, 466 U.S. 941 (1984). On trial were six men, already serving time for committing acts of extreme violence, who were accused of perpetrating one of the bloodiest prison escapes of all time. The trial judge, therefore, undoubtedly was concerned that Spain might try to escape. *See United States v. Kress*, 451 F.2d 576, 577 (9th Cir. 1971) (shackles may be necessary to prevent escape), *cert. denied*, 406 U.S. 923 (1972); *United States v. Apodaca*, 843 F.2d 421, 431 (10th Cir.), *cert. denied*, 109 S. Ct. 325 (1988); *Zygadlo*, 720 F.2d at 1223. Adding to the judge's concern was the potentially explosive political atmosphere surrounding the trial[8] and a

9788-89, and "bear heavily on the credibility of Spain's present contentions," *post*, at 9786. We disproved this assertion in footnote 3. In that footnote, we established that Judge Zirpoli's findings are not inconsistent with the magistrate's, because the two factfinders were focusing on different constitutional inquiries. The dissent refuses to acknowledge this difference, and its inevitable ramifications. Furthermore, we cannot agree with the dissent's characterization of the scope of the inquiry before Judge Zirpoli. The dissent asserts that Spain complained to Judge Zirpoli that impermissible interferences with his right to effective assistance of counsel were "caused by the conditions of his confinement and by 'certain practices' of the defendants, including their use of chains." *Post*, at 9786 (quoting *Spain v. Procunier*, 408 F.2d at 536). The phrase "including their use of chains" is the dissent's own extrapolation.

[8]We note once again that Spain was affiliated with the Black Panther Party, a revolutionary movement that advocated violence as part of its political platform. *See supra* note 1. In deciding whether to secure the courtroom in some manner, the trial court properly considered this as a factor.

previous courthouse shoot-out involving Spain's accomplice Jackson that left three men dead, including the presiding judge.[9] Finally, Spain repeatedly interrupted the pretrial proceedings and often was sent to a holding cell where he continued to cause disruptions.[10]

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[9]On August 7, 1970, during the murder trial of three San Quentin inmates, including George Jackson (the San Quentin prisoner and Black Panther leader who initiated the violence for which Spain was on trial), Jackson's brother entered the Marin County courthouse and took the trial judge hostage in an attempt to exchange hostages for the inmates on trial. Judge Harold Haley was killed in the parking lot during a gun battle between his abductors and the police. The proceedings in Spain's case, which also were held in the Marin County courthouse, began in 1971.

[10]Spain interrupted the pretrial proceedings on the following dates:

April 7, 1972: Spain was removed from the courtroom because he was interrupting the proceedings.

April 14, 1972: Spain and others were removed from the courtroom at 9:26 a.m. because of disturbances. They were brought back into court at 10:50 a.m. Spain and others were removed again at 11:17 a.m. because of further disruptions.

On either April 7 or 14, 1972, the district court noted that several defendants, including Spain, spat on the presiding judge.

May 12, 1972: Spain and others were removed because of disturbances.

May 11, 1973: Spain was in the holding cell at his request. His kicking the holding cell door interrupted argument.

June 1, 1973: Spain refused to enter the courtroom and was left in the holding cell. Later, he was joined by all the defendants. Loud noises from the holding cell interrupted court proceedings numerous times.

June 29, 1973: Spain refused to leave the holding cell to go to court. While he was in the cell with others, loud pounding from the cell interrupted the court.

July 27, 1973: Spain was in the holding cell on his own volition. He was heard shouting in his cell.

September 21, 1973: Spain requested to be removed from the court. After an outburst from Spain, the court recessed and had him put in the holding cell.

We conclude that under these circumstances the trial court appropriately determined that some measure was needed to maintain the security of the courtroom. The remaining inquiry, therefore, is whether the actual measure taken — shackling Spain — was constitutional.

IV

[5] An analysis of the trial court's decision to shackle Spain throughout his trial properly begins with the Supreme Court's decision in *Illinois v. Allen*, 397 U.S. 337 (1970). The Court used *Allen* as an opportunity to provide appropriate guidelines for maintaining judicial control of the courtroom. *Id.* at 351 (Douglas, J., dissenting). The Court provided that faced with a contumacious defendant, the trial judge has at least three constitutionally permissible options. He may "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 343-44.

[6] Upon discussing the possibility of binding and gagging a defendant, the Court admonished that this option should be employed only "as a last resort." *Id.* at 344 ("But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged

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December 17, 1973: Spain was removed to the holding cell for persistently interrupting the court.

February 27, 1975: Spain and other defendants were in the holding cell. Loud pounding emanated from the holding cell and Spain requested a doctor. Forty-five minutes later more loud pounding interrupted the court. Later, three defendants including Spain were in the cell. The loud pounding drowned out the proceedings, compelling the court to remove the three to a more distant holding cell.

March 14, 1975: Spain ignored the court's repeated admonition to be quiet and the court ordered him removed.

except as a last resort.").[11] Numerous reasons were offered for holding that shackling and gagging be used only in extraordinary cases:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint.

Id.

The Court in *Allen*, therefore, identified three "inherent disadvantages and limitations" in this method of maintaining judicial control. The lower federal courts have observed two further weaknesses in imposing physical restraints: they may confuse and embarrass the defendant, thereby impairing his mental faculties; and they may cause him pain. *See Zygadlo*, 720 F.2d at 1223 (shackles may impair mental faculties); *United States ex rel. Boothe v. Superintendent, Woodbourne Correctional Facility*, 506 F. Supp. 1337, 1340 (E.D.N.Y.) (pain may result from shackling), *rev'd on other grounds*, 656 F.2d 27 (2d Cir. 1981). The list of problems that should be considered in a decision to shackle may be summarized as follows:

> (1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;

[11]In his separate concurrence, Justice Brennan noted his agreement with Justice Black's majority opinion that "these three methods are not equally acceptable." *Allen*, 397 U.S. at 350 (Brennan, J., concurring). "In particular," he continued, "shackling and gagging a defendant is surely the least acceptable of them." *Id.*

(2) Shackles may impair the defendant's mental faculties;

(3) Physical restraints may impede the communication between the defendant and his lawyer;

(4) Shackles may detract from the dignity and decorum of the judicial proceedings; and

(5) Physical restraints may be painful to the defendant.

See Kennedy v. Cardwell, 487 F.2d 101, 105-06 (6th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

[7] Because of the problems accompanying a decision to shackle, reviewing courts require that trial judges pursue less restrictive alternatives before imposing physical restraints. *See Woodard v. Perrin*, 692 F.2d 220, 221 (1st Cir. 1982); *Kennedy*, 487 F.2d at 111; *Wilson*, 770 F.2d at 1486;[12] *Tyars v. Finner*, 709 F.2d 1274, 1284-85 (9th Cir. 1983); *Elledge v. Dugger*, 823 F.2d 1439, 1452 (11th Cir.) (per curiam),

[12] *Wilson* involved review of a decision denying the writ of habeas corpus. The court in its review noted: "Ultimately, however, it is incumbent upon the defendant to show that less drastic alternatives were available and that the trial judge abused his discretion by not implementing them." 770 F.2d at 1486. The dissent quotes only the first half of this sentence and construes it as a statement of the burden of proof. The dissent concludes: "The burden was on Spain to produce the evidence to show whether absence as an alternative to shackling continued to be open to him." *Post*, at 9793.

We read the full sentence in *Wilson* differently. The court simply was restating the standard of review on appeal — abuse of discretion — and the concomitant burden this stringent standard placed upon the defendant. While we agree that the district court's basis for granting the writ was in error, we may affirm a judgment on any ground supported in the record. *See Pedro v. Oregon Parole Bd.*, 825 F.2d 1396, 1399 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 726 (1988); *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976); *see also Dunne v. Henman*, 875 F.2d 244, 247 (9th Cir. 1989); *Bowen v. U.S. Parole Bd.*, 805 F.2d 885, 887 (9th Cir. 1986).

opinion withdrawn in part on other grounds, 833 F.2d 250 (11th Cir. 1987) (per curiam), *cert. denied*, 108 S. Ct. 1487 (1988). In weighing the merits of physical restraints, the trial judge must consider the particularities of the case before him. *See Allen*, 397 U.S. at 343-44 (recognizing the need for an ad hoc approach to maintaining judicial control). The trial judge must assess the extent of the limitations that would be present if shackles were applied, taking into consideration the five potential problems listed above. The trial judge then must weigh the benefits and burdens of shackling against other possible alternatives.

A

An analysis of the facts in the present case demonstrates that applying shackles to Spain throughout the entire trial presented many difficulties. The proceedings were unusually long and involved the simultaneous trial of six defendants. During the trial, each defendant was required to appear before the jury with numerous physical restraints.

1

[8] It is axiomatic that our criminal justice system affords every accused individual a presumption of innocence. *Coffin v. United States*, 156 U.S. 432, 453 (1895), *cited in Kennedy*, 487 F.2d at 104. When an accused is forced to appear before his peers in chains, this presumption is seriously jeopardized. *See Holbrook v. Flynn*, 475 U.S. 560, 569 (1986); *United States v. Samuel*, 431 F.2d 610, 614-15 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *Kennedy*, 487 F.2d at 104; *Apodaca*, 843 F.2d at 430-31; *Zygadlo*, 720 F.2d at 1223. Despite this hazard, shackling sometimes may be appropriate because of the public's competing interest in courtroom security and the just administration of law. *Allen*, 397 U.S. at 344.

[9] The amount of prejudice that may flow from a decision to impose physical restraints is not constant. The degree of

prejudice is a function of the extent of chains applied and their visibility to the jury. In other words, the greater the intensity of shackling and the chains' visibility to the jurors, the greater the extent of prejudice. In the instant case, Spain was subjected to maximum restraints: he wore leg irons, a waist chain to which each hand was bound by individual chains about eight inches long, and chains that apparently held him to his chair. Moreover, the shackles were conspicuous; the jury was able to appreciate the full extent of the chaining. Given the number of defendants on trial in shackles, the extent of restraints, and the long duration of the trial, the trial judge was powerless to conceal the chains. In sum, shackling Spain in this manner exposed him to a serious threat of prejudice.

2

[10] Another danger inherent in imposing physical restraints is the possibility that the defendant may feel confused, frustrated, or embarrassed, thus impairing his mental faculties. *Zygadlo*, 720 F.2d at 1223. Along with his habeas corpus petition in July 1975 to have the shackles removed, Spain filed a declaration in which he described the effects of his being physically restrained: "I get exasperated and cannot concentrate .... These shackles and chains must be removed." The magistrate below found that the subject of shackles practically consumed Spain's attention and significantly detracted from his ability to prepare for his own defense. Evidentiary Report, *supra*, at 8-10. The magistrate also noted that Spain went so far as to undertake a course of study of the history of shackling. Evidentiary Report, *supra*, at 9.

The state trial judge was on notice that the shackling might be having this effect on Spain. At various points Spain complained about the shackles and made motions to have them removed. On one occasion, on December 11, 1973, he filed a handwritten affidavit describing the toll exacted by the

restraints, concluding: "[A]ll of the above is a severe physical and psychological strain. I have not been able to understand the court proceedings, in which I've been made to go through; I do not understand my attorneys ...." Clerk's Transcript (CT) 2087.

3

[11] "[O]ne of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint." *Allen*, 397 U.S. at 344. While Spain was not gagged, he otherwise was totally restrained by the shackles. According to the magistrate's findings, the chains "grossly interfer[ed] with his ability to cooperate with counsel." Evidentiary Report, *supra*, at 12. This finding is consistent with the magistrate's determination that the chains seriously impaired Spain's mental faculties.

4

Perhaps the least weighty concern involved in deciding whether or not to shackle a defendant is the affront caused to the dignity and decorum of the judicial proceedings. *See Kennedy*, 487 F.2d at 106 n.8 (concern about judicial dignity and decorum is based purely on policy and does not directly affect defendant). Nonetheless, this is yet another factor that the Supreme Court has suggested trial courts consider before making a shackling ruling. *See Allen*, 397 U.S. at 344.

[12] It is hard to imagine a case in which the dignity and decorum of the judicial proceedings were disrupted more than they were in the present case. Not only was Spain extensively shackled, he stood trial with five other defendants who were similarly restrained.

5

[13] Long ago it was recognized that a high cost of shackling is the pain imposed and the consequential burden placed on

the body and mind of the defendant. Coke, apparently paraphrasing (and expanding upon) Bracton, observed:

> Bracton saith ... if felons come in judgment to answer they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason .... And in another place he saith ... It is an abuse that prisoners be charged with irons, or put to any pain before they be attainted.

3 Coke Inst. 34 (1797), *quoted in* Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 St. Louis Univ. L. J. 351 (1971). While today's shackles are themselves less painful than they were in Coke's day, *see Boothe*, 506 F. Supp. at 1340, they may inflict enough pain in certain circumstances to call into question the propriety of their use, *see United States v. Whitehorn*, 710 F. Supp. 803, 840 (D.D.C. 1989) (employing plexiglass partition instead of shackles, which are "obviously less desirable" because of their "punitive nature" and the long duration of pretrial confinement). Conceivably, in a given case the chains may be so numerous and the trial so lengthy that shackling is not a viable option.

This is such a case. Spain was heavily chained. The magistrate concluded that the total weight of the shackles was 25 pounds. In addition, the judicial proceedings were unusually long. The pretrial proceedings, during which Spain was restrained, lasted almost four years. The trial itself spanned seventeen months, almost a year and a half. Of course, the mere sight of the chains gave the trial judge some indication of their weight; and the trial judge realized at the outset that the trial would be lengthy.

Spain's complaints about the pain caused by the chains were immediate, chronic, and impassioned. He began to complain of pain soon after he was first shackled. At his arraignment on October 15, 1971, Spain requested the court

to examine his wrists because his handcuffs were too tight. The court ordered the guards to inspect Spain's wrists and to loosen his handcuffs if necessary. Spain then asked to be unshackled; the court denied this request. On January 17, 1972, at a hearing on Spain's motion to have his assigned counsel replaced by counsel of his choice (which was denied), Spain requested that his chains be removed so he would be able to take notes. This request also was denied.

As the lengthy pretrial period continued, Spain's pain increased and his requests for unshackling grew more frequent and more urgent. At a May 11, 1973, hearing on another of Spain's motions to substitute counsel of his choice, Spain again complained of pain in his wrists. On June 1, 1973, Spain, now wearing bandages under his handcuffs, called the court's attention to the pain caused by his arm restraints. By November, Spain's condition had deteriorated markedly. He complained to the trial court that he was "physically unable and unwilling to endure the pain of the chains digging into [his] skin."[13] Spain's requests for unshackling and his complaints of pain continued. He complained of pain at a hearing on December 17, 1973. On January 11, 1974, Spain requested an opportunity to testify as to his pain and his deteriorating health. The court did not permit Spain to testify. On November 29, 1974, a doctor examined Spain after Spain reported rectal pain, lower back pain, and weight loss. The doctor recommended, in a report addressed to the Chief Medical Officer at San Quentin Prison, that Spain "in no event be chained during his trial, in view of the weight loss and the evidence of intestinal and/or nutritional disorder." CT 2508. The doctor's recommendation was ignored.

In the month before the beginning of trial, there was a rapid succession of pain reports and requests for unshackling. On

[13]Spain lodged this complaint in a handwritten motion dated November 30, 1973, in which he sought to waive his right to be present at trial. The motion is quoted in full *infra*.

February 11, 1975, at the request of Spain's lawyer, a second doctor examined Spain and recommended that the chains be removed because they were "aggravat[ing] the patient's back pathology." CT 2502. Spain refused to attend a February 21 hearing because he was suffering from constant pain. At a hearing on February 27, Spain's counsel advised the court that Spain was unable to sit without pain and accordingly was forced to either stand or lie down. On March 3, Spain requested to be removed from the courtroom because he was in pain. On March 4, the second doctor noted that the chains "may have been the stress which precipitated the onset of pain in a spine, which was already deformed. It is almost certain that a return to the Marin court, fettered as he has been in the past, would exert more stress on his injured back and aggravate his problem." CT 2499.

On March 10, Spain's counsel filed a declaration stating that Spain was unable to cooperate in his defense, because "most of the time, Mr. Spain has been either under heavy sedation, absent from the court room due to his inability to sit in the restraints, or in extreme pain both in and out of the court room." CT 2494-95. Apart from its response to the March 3 request for removal from the courtroom (which apparently was granted only as to that day), the court ignored Spain's complaints.

On March 18, 1975, one week before trial, Spain filed a handwritten affidavit summarizing his condition:

> I, johnny larry spain, depose and say:
>
> I That I have been advised by my attorney to state my reasons for waiving the right to be present at the hearing of March 18, 1975, and make this statement under the penalty of perjury. The major reasons are as follows:
>
> A.) First and foremost, I have been continuously subjected to anywhere from 7 to 10 hours of being

chained and shackled, sometimes to the floor (if in the holding cell), and always to a fixed position if in the courtroom, while most of the time being in pain and/or under heavy medication; in either instance I have found it almost impossible to understand the proceedings and the court has constantly refused to remedy (in fact, the court has profoundly imposed) the conditions under which I suffer pain as a result of multiple medical problems of the severe nature.

B.) Under the latter circumstances I do not feel it is worth chancing any further and perhaps irreversible physical damage to my person just to claim some phony "due process" rights, when, under the above circumstances, "due process" really means being subjected to pain in a sham and mockery of justice.

C.) I have been examined by private doctors — Dr. Betty Jo Smith, who is a surgeon in chief; Dr. Peter La Riviere, and Dr. Corey Weinstein — and all the doctors have made reports that clearly indicate (or rather specifically state) that my being chained and shackled and otherwise subjected to the conditions which exist in the court building in Marin county, for the defendants in People vs. Bingham, are necessarily harmful to my already bad health condition.

D.) I have requested medical attention from the prison medical staff for specific problems and I have been denied any medical attention at all in specific instances, particularly regarding the severe pain in the sciatica (right side) area. I have been given shots in my back (from my shoulders to my lower back) by Dr. White, a prison doctor, and these shots were specifically for the pain I'm having in my back, and yet the prison claims that there is "nothing wrong" with

me, and the court claims there is "nothing wrong" with me, but that is an idiotic supposition simply because one does not receive shots unless *something* is wrong with a person. Moreover, the shots have become increasingly ineffectual for the purpose which they are supposed to serve. The court's position (which is always the prison's position) is obviously biased.

II That the above are the major reasons I do not wish to be present at the hearing on March 18, 1975, which means, in sum: that I'm forced to select "due process" or severe pain, both of which mean the same thing in the case of *People vs. Bingham.*

. . . .

/s/ johnny larry spain

CT 2635-36 (emphasis in original). On March 24, the day before trial, the court denied the defendants' motions to be unshackled at trial.

Spain's condition did not improve. On July 23, a third doctor, who conducted an examination when Spain was taken to San Francisco General Hospital for evaluation of weight loss, abdominal pain, rectal bleeding and lower back pain, recommended "that the patient be permitted adequate exercise and more importantly that he not be restrained with chains for court appearances which will aggravate his chronic back problem." CT 4461. This doctor's report, like those of the two doctors before him, was ignored by the court. On July 24, Spain once again filed a declaration attesting to his pain:

By order of the trial Judge, I am shackled and chained to my chair like a wild animal.

I am in constant pain and discomfort. After sitting in the stationary manner for a period of twenty min-

utes, I am just beside myself. I get exasperated and cannot concentrate and get to the point of complete emotional breakdown.

At one time, when the jury was chosen in the case, at approximately 4:00 p.m. I was so distraught with pain and the thought of having to endure a period from six months to nine months was more than I was able to endure. Without thinking, and in complete frustration, I threw my files. I know I meant no harm to anyone.

These shackles and chains must be removed. I cannot endure the pain. If I were permitted to stand up and move my body for a moment or two every fifteen or twenty minutes, then I could endure the trial. Otherwise, I am not able to do so.

I make this promise to the Court that, if the chain and shackles were removed and I could sit in that Courtroom as a human being instead of a wild animal, my conduct would be more than exemplary.

. . . .

/s/ johnny larry spain

CT 4459-60. Like all others, this plea was ignored.

[14] In sum, Spain repeatedly voiced his complaints o pain, which were corroborated by uncontested medic reports. The magistrate, after an evidentiary hearing, co cluded that the pain was real and substantially interfered wi his ability to participate in his own defense.[14] On the prese

[14]The state trial court unfortunately never bothered to conduct an e dentiary hearing to explore this problem. When a shackled defendant co plains of pain, the trial court is not free to ignore it. Instead, the court m

state of the record, we have no basis for contesting this finding.

B

The decision to shackle Spain throughout the trial in order to maintain courtroom security clearly posed many serious drawbacks. All the limitations and disadvantages that accompany a decision to impose physical restraints were maximally present in this case. As a result, the trial court abused its discretion if there was available any option that did not present the same dangers. *See Allen,* 397 U.S. at 344.

1

[15] The trial court never really considered the alternatives to shackling the defendants in order to secure the courtroom. Instead, the court believed the solution was to be found between the two extremes of total restraint and total freedom from shackles. The court revealed its mindset on January 11, 1974, when it stated: "I have to consider all of the options from the total release of restraint to continuation of the existing restraint." In its March 24, 1975, order denying the motion for unshackling, the court once again exposed its limited focus: "The Court has considered every possible opportunity between freeing all or some inmate-defendants entirely from restraint, to full restraint for all inmate-defendants."

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ascertain the legitimacy of those complaints and then consider the feasibility of shackling as an option. In the ordinary case, imposition of shackles is not likely to cause much pain to the defendant. This is no ordinary case.

The dissent accuses us of substituting our discretionary judgment for that of the state trial court. *Post,* at 9795. This is not so. The state trial court simply did not exercise its discretion; it completely ignored Spain's complaints of pain and thus did not assess the factor of pain in making its shackling ruling. Under these circumstances, we are not second-guessing the informed judgment of the trial court, but making a constitutional judgment where the state trial judge failed in his duty to do so.

These statements make it plain that the trial court actually did not consider "all of the options." Rather, it considered only the options involving the degree of shackling.

[16] The *Allen* decision suggested at least two other possible options *other than shackling*: a trial court could cite the defendant for contempt; or it could remove him from the courtroom and conduct the trial in his absence.[15] Because Spain was serving a life sentence for first degree murder at the time of the trial, citing Spain for contempt would have been meaningless. Hence, this suggested alternative to shackling was not feasible in the context of this case. However, the same cannot be said of excluding Spain from trial.

2

[17] An accused has a well-established right to be present at his own trial. *Badger v. Cardwell*, 587 F.2d 968, 970 (9th Cir. 1978). Ordinarily, his presence secures other fundamental guarantees — the right to confront witnesses, the right to help prepare his own defense by assisting counsel during trial, the right to listen to testimony, and the right to testify on his own behalf. *See United States v. Gagnon*, 470 U.S. 522, 526 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, *e.g.*, *Illinois v. Allen*, 397 U.S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.") (per curiam); *Badger*, 587 F.2d at 970-71; *United States v. Latham*, 874 F.2d 852, 856 (1st Cir. 1989).

[15]Recently, in *Stewart v. Corbin*, 850 F.2d 492 (9th Cir. 1988), we reviewed a trial court's decision to shackle and gag the defendant. In applying the least restrictive alternative analysis, we inquired whether citing the defendant for contempt or expelling him from trial were feasible options and concluded that they were not. *Id.* at 499-500.

[18] Nevertheless, removing the defendant from trial may be a permissible option in certain cases. *Allen*, 397 U.S. at 343-44. Indeed, the Court in *Allen* specifically noted that removal from trial in some instances may be a preferable alternative to shackling and gagging. After discussing the drawbacks associated with shackling and gagging, the Court concluded:

> It is in part because of these inherent disadvantages and limitations in this method of dealing with disorderly defendants that we decline to hold with the Court of Appeals that a defendant cannot under any possible circumstances be deprived of his right to be present at trial.

Id. at 344.[16]

3

[19] On several occasions, Spain raised the possibility of being absent from trial. In a handwritten motion filed on November 30, 1973, Spain requested that he be permitted to remain at San Quentin rather than to be transported to the courtroom in pain:

> Motion by johnny larry spain:
>
> I I would now like to move this court for an order allowing me to remain at San Quentin Prison rather than be brought to this courtroom.
>
> II I am often chained for 9 or 10 hours a day while in court and I am physically unable and unwilling to endure the pain of the chains digging into my skin, and of having blood-flow infringed upon by my

[16]The Court in *Allen* upheld the trial court's decision to expel the defendant from trial.

being chained in a manner such as *would and does* keep me in a fixed position.

III Per paragraph "II," I'm under physical compulsion to make a decision, a choice between being in utterly unnecessary pain or giving up constitutional rights.

I give them (the rights) up

/s/ johnny l spain

CT 2078. The court never ruled on Spain's request; he continued to be shackled and brought to the courtroom daily.

Spain renewed his request to be absent from the trial at a pretrial hearing on January 11, 1974. During the hearing, the court and Spain's counsel addressed the issue of shackles. The court inquired whether Spain would be satisfied if the manacles were removed, while leaving the other chains in place. Spain's counsel responded:

I can tell you this: My client told me . . . that in the event that there is any shackling whatsoever, any restraint where he cannot have even the semblance of a fair trial, he does not care to come into this courtroom. He does not care to come into this building, and he would just as soon remain in his cell at San Quentin, because that's what he has told me to do.

He has ordered me to proceed in that regard, and I have tried to convince him that at least we get these pretrial matters over with and probably we can have an atmosphere that we can really work in. I have made that assurance to him.

Now, he has told me unequivocally without any reservation that if there is any form of restraint in

> the courtroom where that jury looks upon him as though he is a demon, that he will not come into the courtroom or he will not come into the building at all. He will not go into the holding cell. He will remain in San Quentin where he's housed now.
>
> I just want your Honor to know that that is the transmission that Mr. Spain has given to [me].

R.T. 2949-50.

[20] On April 11, 1975, Spain once again raised the possibility of being excluded from trial instead of appearing in shackles. In a handwritten affidavit, Spain attested that he had signed a "Waiver of Defendant's Personal Presence" because of the physical and psychological duress imposed by the chains. CT 2861. He claimed that he was "not physically able to stand trial according to doctors and specialists who examined [him]" and that the chains subjected him to "severe back pain," "severe pain in the right sciatica nerve," and "muscle cramps, spasms, and pulled muscles with increasing frequency." Further, he alleged that "[t]he shackles and chains cause[d] [him] to be of little or no assistance in [his] defense . . . because [he could not] concentrate while in pain and, thus, most of the time [he could not] follow the proceedings in the case."[17] *Id.* at 2861-62. The court conducted a hear-

[17]The prosecution opposed this motion, arguing that the waiver was not a voluntary relinquishment of his rights because Spain stated that he was being forced to choose between shackles and his presence at trial.

We disagree. Unquestionably, Spain confronted a choice: either remain at trial with physical restraints or be absent from trial. It is critical, however, that this choice was not unlawfully imposed. Spain himself, not the trial court, was the cause of his dilemma. That is, the violent nature of the crimes charged, the political atmosphere surrounding the case, and Spain's disruptive conduct prompted the trial court to take some action to secure the courtroom. Under these circumstances, appearing at trial wholly unfettered was not feasible. Thus, some form of shackling and removal from trial were among the options to be *considered*. A deliberative decision among unpleasant choices does not render the decision involuntary. *See Brady v. United States*, 397 U.S. 742, 749-50 (1970) (defendant's guilty plea, even if entered to avoid possibility of death penalty, was voluntary).

ing concerning this matter and concluded that Spain may be excused from personally appearing during pretrial matters, but not during jury selection or the trial.[18] CT 2882. Accordingly, Spain was forced to attend the trial for seventeen months in a physically and mentally debilitated condition.

4

[21] We conclude that Spain gave the trial judge the option of excluding him from trial. Exclusion from trial would have been a less restrictive alternative. At a minimum, Spain would have been better able to assist in his own defense. Without the chains, he would not have experienced the pain and humiliation that the district court concluded prevented him from meaningfully participating in aiding his counsel. At least two of the five drawbacks associated with a decision to shackle, therefore, would have been eliminated. At the same

[18]At the hearing on April 11, 1975, the court explored the scope of the requested waiver, which from the affidavit appeared to cover the entire trial. Initially, Spain's counsel was unsure and sought to have Spain testify to the extent of the request. The court would not permit Spain to testify. Spain's counsel then stated that his client wished to be able to waive his presence on selected days when he was not feeling well. The court refused to allow Spain to execute a waiver once trial had begun, stating: "Once the evidence commences, it would seem to me that there is no way that he can waive his personal presence." [R.T. 5194-95]

This exchange between the court and counsel is noteworthy for two reasons. First, the trial judge incorrectly believed that Spain could not waive his right to be present at trial. *Allen* specifically provides removal from trial as a possible alternative to shackling. To the extent that California law prevents absence from trial in this case and absence is less restrictive than shackling, federal law must prevail. U.S. Const. art. VI, cl. 2. Second, it would appear that Spain was not seeking to effectuate a complete waiver of his presence from trial. However, Spain may have been capitulating to the trial judge's view of the law. That is, at the outset of the April 11th hearing, the court made it clear that Spain could not be absent during the trial. Spain then limited the scope of the waiver, which in his affidavit seemed all encompassing. See CT at 2861 ("I am not physically able to stand trial . . . .").

time, courtroom security would not have been jeopardized in the least.

[22] The trial court also might have had an alternative short of total exclusion; the court might have allowed Spain to be absent on selected days when he was not feeling well. Perhaps with limited periods of rest without being shackled, Spain could have endured the days of trial in physical restraints. Spain fairly raised this possibility, but the court failed to explore it.[19]

[23] Consequently, the trial judge committed constitutional error[20] in failing to employ shackling as a "last resort."[21]

V

[24] Due process requires that shackles be imposed only as a last resort. In determining whether shackling is a last resort, a trial judge must consider the benefits and burdens associated with imposing physical restraints in the particular case. If the alternatives are less onerous yet no less beneficial, due process demands that the trial judge opt for one of the alter-

[19]The record indicates that despite the trial court's ruling that Spain must attend trial, Spain refused to appear in court on a couple of occasions. CT 3405; 4006. However, there is no indication that this very brief absence served to alleviate the pain Spain suffered throughout his long trial.

[20]Our conclusion is that the state trial court committed constitutional error, not torture. We disagree with the dissent's contrary reading of the majority's position. *Post*, at 9787-88, 9795 A defendant's right to due process may be violated even if the shackles impose mental and physical pain short of torture.

[21]There was perhaps another less restrictive alternative: the reduction in the number of the chains, which would have alleviated Spain's pain and concomitant mental impairment. The trial judge never pursued this possibility, perhaps because he believed that Spain was taking the position that either all or none of the chains be removed. However, the trial judge could have rejected this position and reduced the number of the chains by concluding that Spain's constitutional right to a fair trial so demanded.

natives. In the present case, which is unparalleled in the extent and duration of shackling, the trial judge failed to employ the less restrictive alternative of excluding Spain from trial. This failure deprived Spain of his right to due process.[22] The district court's decision to grant the writ of habeas corpus is therefore **AFFIRMED.**

NOONAN, Circuit Judge, dissenting:

With the greatest respect I differ from my colleagues in the conclusion they have reached. The case has been a difficult one for all of us and has required extensive deliberation. The very difficulty of the case points to the conclusion that we are not in an area where the Constitution of the United States mandates a result but in an area where a federal court is wrongly substituting its discretion for the discretion conscientiously exercised by the court that tried Spain for murder and convicted him of two murders.

THE TASK OF THIS COURT

The only ground on which a federal court may invalidate a conviction in a court of one of the states is that the state in obtaining the conviction violated the Constitution of the United States. We have no jurisdiction as a federal court to substitute our discretion for that of a state trial judge. Only if

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[22]The dissent speculates that had the trial court granted Spain's wish to be absent from trial, Spain's habeas claim instead would be that he was deprived of his sixth amendment right of confrontation and his right to confer with counsel. *Post,* at 9795. Perhaps this is true. However, this in no way detracts from our holding. Of course, there are many cases in which the exercise of a trial court's discretion will result in an appeal, no matter how that discretion is exercised. In the present case, if the trial court had determined that shackling Spain was not a feasible alternative and that granting Spain's request to be absent from trial was the least restrictive alternative, an appeal based on his absence would be meritless.

some action by that judge in the exercise of his discretion is so outrageous a departure from the requirements of fair play that the defendant has been denied due process of law are we entitled to set the trial verdict aside. The question before us is not whether the trial judge has abused his discretion but whether he abused it so badly that Spain did not receive a fair trial or was denied his right to counsel.

The constitutional standard is set out in the leading case on this subject, *Illinois v. Allen*, 397 U.S. 337 (1970). Justice Black there begins his statement of the case by referring to the requirements of set by the Sixth Amendment and, in invalidating the state process, Justice Black concludes that the defendant indeed was denied a right guaranteed by the Sixth and Fourteenth Amendments. *Id.* at 346. The same standard is evident in our most recent case on the subject, *Stewart v. Corbin*, 850 F.2d 492, 497 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1737 (1989), where the court says: "The issue in the present case is not whether in retrospect, the trial court could have handled the matter better, but rather, whether the trial court denied appellant a fair trial under the circumstances." Similarly in *Harrell v. Israel*, 672 F.2d 632, 637 (7th Cir. 1982), the court balances the prejudicial effect of shackling against the danger of a prisoner in a maximum security prison engaging in violence in a courtroom and concludes that the prisoner "suffered no denial of due process." That is the constitutional issue we have to decide.

It is true that talk of abuse of discretion has entered the cases. Perhaps the origin of this talk is the careless headnote using this language in *Illinois v. Allen*, 397 U.S. at 338. The basis of the headnote is Justice Black saying at 347: "There is nothing whatsoever in the record to show that the judge did not act completely within his discretion." But this unnecessary dictum was not the way Justice Black had formulated the question before the court. In *Woodard v. Perrin*, 692 F.2d 220, 222 (1st Cir. 1982), the court manages to put the two standards as alternatives, finding that the state judge did not

abuse his discretion and alternatively that the judge did not deny the defendant a fair trial. Finally, the erroneous standard crept into our circuit in *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985), where it is stated baldly: "We review a trial court's decision to use shackles under an abuse of discretion standard." *Woodard* and *Harrell* which are cited in support of this statement do not in fact support it. If there was any argument that we are still bound by the erroneous statement of the standard we are now liberated by the correct phrasing of it in *Stewart*.

Our task is to determine whether the right of counsel was denied and whether a fair trial under the circumstances was denied.

THE DUE PROCESS BALANCING REQUIRED OF THE TRIAL JUDGE

The court that tried Spain was required to balance the danger to the court of not shackling him against the prejudice and harm that would result to him from shackling. To appreciate the situation in which the trial court found itself, consideration must be given to the context provided by Spain's membership in the Black Panther Party, by Spain's own history of violence against law enforcement officers, and by the murder of a Marin County trial judge and the kidnapping of the judge, the prosecutor and three jurors that had been carried out by Panthers in 1970 in the same Marin courthouse in which Spain went on trial.

The Black Panther Party. Here is not the place to attempt a definitive assessment of the aims and methods of the Black Panther Party. The view that it was the target of official surveillance, provocation and persecution has been frequently stated by its members and sympathizers. Here we only consider the prevalent official view of the Black Panther Party that a reasonable judge would have had to take into account in considering what Spain might do in his courtroom.

The most famous Black Panther slogan, known to everyone at the time, was "Off the pigs." It was generally understood that these words meant, "Kill police officers." *See, e.g.* "Gun-Barrel Politics: The Black Panther Party, 1966-71", Report by the Committee on International Security, House of Representatives, H.R. Rep. 92470, 92nd Cong., 1st Sess., 43 (1971). The Party aimed at making a revolution. The Party emphasized armed struggle and guerilla warfare. The Party planned violence, incited terrorism and spread inflammatory rhetoric designed to encourage homicidal assaults upon the police. *Id.* 133-35. The articles and cartoons of the party publication reflected a "continuous endorsement of the physical extermination of police officers." *Id.* at 34. Cartoons in this publication graphically demonstrated panthers attacking pigs in police uniforms and actually killing them. *Id.* at 37. A virus of violence had been released in the community.

Spain's Own History. In 1967 at the age of 17, Spain committed a robbery and in cold blood murdered a man with whom he had no previous relationship. *People v. Gray,* 263 Cal. App. 2d 692; 69 Cal. Rptr. 751 (Cal. Ct. App. 1968). Convicted of this murder, he was confined to Soledad Prison. *Spain v. Procunier,* 408 F. Supp. 534, 539 (N.D. Cal. 1976), *modified in part, aff'd in part, rev'd in part,* 600 F.2d 189 (9th Cir. 1979) (Kennedy, J.). While Spain was in Soledad, a prominent Black Panther, George Jackson, and others, not including Spain, were indicted for the murder of Officer Mills within the prison. *Id.* at 540. Jackson was transferred to San Quentin. *Id.* Spain, viewed as a trouble-maker for his militant views, was also transferred to the Adjustment Center at San Quentin. *Id.* at 539. The Adjustment Center is still known as the place where the most violent inmates are kept. *People v. Wright,* 48 Cal. 3d 168, 214; 255 Cal. Rptr. 853; 768 P. 2d 72 (1989).

On August 21, 1971 Jackson took over the cell block with a weapon. He and his confederates in the space of one-half hour then murdered three bound and helpless officers, Jere

Patrick Graham, Paul William Kresnes and Frank DeLeon, and two fellow prisoners, Johnny Lynn and Ronald Kane. They also cut the throats of, but did not succeed in killing, Officers Breckinridge and Rubiaco. Spain was one of Jackson's confederates. *Spain v. Rushen*, 543 F. Supp. 757, 760 (N.D. Cal. 1982), *aff'd without opinion*, 701 F.2d 186 (9th Cir.), *vacated on other grounds, Rushen v. Spain*, 464 U.S. 114 (1983) (plurality opinion). He had conspired with him to make the escape, secreting an escape map and ammunition in the cell. At the time Jackson took over the cell block he gave Spain an explosive that Spain still carried when he was recaptured. The events were front page news, San Francisco Sunday Examiner & Chronicle, Aug. 22, 1971, at 1, col 1, and made an indelible impression on correctional authorities, on law enforcement officers, and indeed on anyone concerned with law and justice in the United States. The impression reinforced another indelible impression made a year earlier in the Marin County Courthouse.

The 1970 Murder of the Trial Judge, the Maiming of the Prosecutor, and the Kidnapping of the Jurors. On August 7, 1970 James McClain was on trial in the Marin County Courthouse before Judge Harold J. Haley. The offense charged was stabbing a San Quentin officer with a knife within the prison. McClain conducted his own defense, calling a number of fellow prisoners as witnesses. According to the Marin Independent, August 7, 1970, p.4 the judge had ruled that McClain should not be chained lest the jury be prejudiced. In the middle of McClain's case, Jonathan Jackson, George Jackson's brother, entered the courtroom and took command of it with guns. According to the New York Times, August 16, 1970, he was to be eulogized for his actions as a "courageous revolutionary" by the Black Panther Minister of Defense.

According to the San Francisco Chronicle, August 8, 1970, at 1, col. 8, Jackson shouted, "This is it, gentlemen. Everybody freeze." The courtroom became his. He gave one prisoner-witness a revolver, another prisoner an automatic

pistol, and McClain a sawed-off shotgun; he himself kept a carbine. The armed men then kidnapped Judge Haley, Assistant District Attorney Gary W. Thomas, and three women jurors, binding them with wire and forcing them out of the courtroom, into a parking lot near the courthouse, and into the rear of a van in the lot. The shotgun was strapped to the judge's throat. Thomas attempted to escape and was shot and wounded so as to be paralyzed for life. Juror Maria Graham was shot in the right arm. Juror Joyce Rodoni was hospitalized for shock. Two of the prisoners and Johnathan Jackson were shot and killed. Half of Judge Haley's face was blown off by his captors; he died instantly.

Circumstantial evidence existed that Jonathan Jackson had not acted alone in planning the invasion of the courtroom. The State of California had sufficient evidence to obtain an indictment of another, not yet in custody, for aiding and abetting. Similarly, the state had sufficient evidence to obtain an indictment of a different person as the coconspirator of George Jackson and Spain, not yet in custody but involved in aiding their planned escape from San Quentin. At the time of Spain's trial for murder it was not unreasonable for the trial judge to believe that there were conspirators at large capable of attempting his rescue by similar violence.

The Continuing Dangers. The trial judge made plain that the subject of changing the condition of restraints was "constantly" in his mind. He looked for the "hoped-for opportunity to change the condition of restraint." The reason that he did not change his mind was that a stream of incidents — a number of which he did not make public, lest the publicity prejudice the defendants — was brought to his attention which made him unwilling to risk the security of his courtroom by relieving Spain and his codefendants of their restraints.

The remarkable ability of prisoners to cause serious harm to guards and to other prisoners in the twinkling of an eye and

with the most ordinary utensils or articles of furniture has been vividly set out in *Burscino v. Carlson*, 854 F.2d 162, 165 (7th Cir. 1988). Light bulbs, mop wringers, sharpened tooth brushes, sharp pencils and bare hands have all been employed by prisoners held within a maximum security prison to maim or to kill. *Id.* What could be done in a prison could be done in a courtroom by a prisoner not merely ill-disposed to the system but actually a member of a revolutionary group committed to the use of violence — a prisoner who would not be deterred by any prospect of increased prison time, a prisoner whose indictment for murder of prison guards reflected at least probable cause that he was capable of the most extreme violence. The judge who tried Spain knew what had happened to the prosecutor and to the jury and the judge who had tried James McClain. The judge had to balance the danger present in this extraordinary context against what chaining would do to Spain.

THE EFFECTS OF THE CHAINING

An evidentiary hearing was held in connection with the present petition. Charles S. Garry, Spain's former counsel, testified that Spain was so preoccupied with the chains that "we weren't able to discuss another solitary thing." Spain, he stated, was "not mentally, emotionally, or in any other way in the courtroom. I had no attorney-client rapport or relationship with him." There was, Garry testified, "No way in the world I could communicate with him." He also testified that on the basis of Spain's complaint about the effects of the chains, he filed a petition for habeas corpus during the trial with the California Court of Appeals. The petition was denied.

Dr. Delman was a psychologist who saw Spain four times seven or eight years after the trial. He reviewed Spain's prison psychiatric file but did not speak to any correctional officers, prison officials or persons on the side of the prosecution. He interviewed only Spain, his friends, and his supporters. He

testified on the basis of this research that "Spain was so depressed and pessimistic and beaten by the chains, that I don't believe he was capable of cooperating in a reasonable way."

Dr. Sutton, a staff psychiatrist at San Quentin, had examined Spain before and at the time of the trial. She testified that his health problems were minor, that he was suffering from neither psychiatric disease nor clinically-recognizable depression at the time of trial, and that the shackles were no substantial impediment to his cooperating with counsel or testifying at the trial.

Spain himself testified that he suffered pain throughout the trial, that his waist was rubbed almost raw by the chains, that he suffered headaches, hemorrhoids, back pain, and loss of weight. He stated that he did not testify at the trial because he did not see how he could be believed by the jury if he was in chains.

Spain also testified that the state had provided him with valium for his headaches and that he did not use all the tablets provided but had secreted 177 pills. He did not deny that he had been examined by Dr. William Clark on March 21, 1975 and pronounced to be "in perfect health." He also testified that the state provided him with a rubber cushion he could sit on after the state had, before the trial, provided him with surgery for his hemorrhoids. On cross-examination he testified he did not know what caused the hemorrhoids or his back problems.

As to his communications with his counsel, Charles Garry, he testified that he discussed with Garry his defense that he blacked out at the time of the murders; that he discussed with Garry various testimony at the trial against him offered by prison guards; that he discussed with Garry the incriminating evidence found in his cell after the murders; and that he had seven or eight investigators working for him and conferred

with some of the investigators and with Garry as to his defense.

Spain's counsel in this proceeding introduced transcripts of an earlier federal habeas corpus proceeding before Judge Zirpoli, held while the Marin murder trial was in progress. Counsel for Spain directed his attention to the testimony Spain had then given as to damages the chains had done to his wrists and to his testimony in that proceeding that he had been unable to talk about his case confidentially to his attorney. Spain read into the record his testimony before Judge Zirpoli that the chains made him feel that he was having to prove he was a human being.

At the conclusion of this evidentiary hearing the magistrate made certain findings. Citing the incidents already quoted of Garry's testimony, she found that it was "marked by hyperbole" but nonetheless gave it some discounted weight. She accepted him as an expert in the field of criminal defense and his testimony in that role that only exceptional circumstances, not present here, would have led him not to have put Spain on the witness stand. She recited the conflicting testimony of the psychologist and psychiatrist and found the value of their opinions to be "limited." She proceeded to evaluate the effects of the shackling.

In making this evaluation the magistrate began with a statement from a California case that shackling "inevitably tends to confuse and embarrass the defendant and thereby materially to abridge and prejudicially affect his constitutional right of defense." She explicitly found that, contrary to Garry's testimony, Spain was not entirely "out of it." But she went on to say, "The evidence before us clearly establishes that the shackling preoccupied Spain during the trial." As evidence she then cited Spain's declaration filed in July 1975 with his habeas corpus petition in the federal court and his testimony before Judge Zirpoli in that proceeding on being made to feel non-human. She ended up concluding that the chains "were

a significant factor in inhibiting Spain's ability to cooperate with his counsel." Her conclusion coincided with her starting point in the California case she quoted.

The magistrate also assessed the effects of chains on Spain's decision not to testify. The state took the position that the evidence was such that he would have gained nothing by testifying. The magistrate declined to review the evidence. Instead she concluded that, as the chains interfered with his ability to cooperate with counsel, they also must have effected his decision-making as to testifying. These conclusions of fact are very little different from the magistrate's starting point in the California case that said shackles "materially abridge and prejudicially affect the constitutional right of defense."

In a separate section entitled "Findings of Fact," the magistrate concluded:

> 1. Petitioner's shackling at trial aggravated his existing medical and psychological problems, and pained and preoccupied him during that time.
>
> 2. Petitioner's shackling interfered with his ability to communicate with his trial counsel and to participate in the preparation of his own defense.
>
> 3. Petitioner's shackling impeded his ability to testify on his own behalf.

The district court reviewed the magistrate's report but did not take new evidence and so was dependent on the magistrate's findings of fact. The district court, however, paraphrased Finding 2 of the magistrate as a finding that "petitioner was so preoccupied by the chains that he was unable to cooperate with his attorney during trial." As the basis for this conclusion the district court quoted Spain's 1975 habeas corpus petition and his testimony before Judge Zirpoli. As to Spain's ability to testify, the district court con-

cluded: "Not only did the shackling unconstitutionally place on petitioner the burden of proving his innocence as discussed in Part A above, but at the same time it deprived him of his ability to do so." In support of this statement the district court noted that it was Spain's "preoccupation with the shackles and his medical problems" that made him unable to testify while his chained codefendants did testify.

As an appellate court we review the findings of fact of the district court under Fed. R. App. P. 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses." Review of factual findings is for clear error and when findings "are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court findings." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

However, a trial judge may not "insulate his findings from review by denominating them credibility determinations . . . . Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in the finding based on a credibility determination." *Id.*

Anderson is carefully crafted to require deference from the appellate court but does not relieve that court from "its responsibility to correct findings of fact when it is left 'with a definite and firm conviction that a mistake has been committed.' " *See Goodman v. Lukens Steel Co.*, 777 F.2d 113, 128 (3d Cir. 1985) (quoting *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948)). There are occasions when focus on the evidence will leave the firm conviction of error on the part of the appeals court, *e.g.*, *Goodman* at 129. A trial court, for example, is not free to accept testimony from a witness without regard to that witness' "obvious

bias." *Henson v. CIR*, 835 F.2d 850, 853 (11th Cir. 1988). As *Anderson* itself pointed out, if a witness' statements are internally inconsistent the witness does not have to be believed.

In this case the magistrate heavily discounted the testimony of the psychologist and the psychiatrist and applied the gentle term "hyperbole" to statements of Charles Garry which were wildly improbable, contradicted the statements of Spain himself, and deprived Garry of any pretense of being an objective and reliable witness. For hard evidence as to the effect of the chains on Spain's health and on his ability to communicate with Garry and prepare his defense, the magistrate relied on Spain's own declaration in connection with his earlier habeas corpus petition and his testimony before Judge Zirpoli in that proceeding. The district court used the same evidence in its findings on this subject.

The evidence on which the magistrate and the district court relied was, therefore, documentary evidence — not live testimony where demeanor and inflection are important, but pieces of paper recording words which we can review as well as the district court, using the clear error standard of review of what the district court has found as fact. The transcript of the habeas corpus petition before Judge Zirpoli was introduced into this case. Spain's declaration and testimony in that proceeding are indeed the chief basis for the findings in the present case. We are equally free to take judicial notice of the judicial findings made in that proceeding.

The proceeding before Judge Zirpoli was directed against the state director of corrections, the warden of San Quentin, and certain correctional officers at San Quentin. *Spain v. Procunier*, 408 F. Supp. 534. Spain, along with Hugo Pinell, Fleeta Drumgo, Luis Talamantez, David Johnson, and Willie Tate challenged their confinement in the Adjustment Center in San Quentin; attacked practices of the defendants interfering with their right of access to effective assistance of counsel and access to the courts; and complained of a lack of adequate

medical care and other repressive measures detrimental to their physical and emotional health. *Id.* at 536. Evidentiary hearings, lasting 29 days, were held on their allegations. District Judge Zirpoli gave his decision on January 14, 1976 and modified it February 10, 1976. At the time of Judge Zirpoli's decision, Spain had been on trial in the Superior Court of Marin County since March 1975.

Spain explicitly claimed impermissible interferences with his right to the effective assistance of counsel and his right of access to the court. The interferences, he contended, were caused by the conditions of his confinement and by "certain practices" of the defendants, including their use of chains. The issues litigated between Spain and defendants in the case were decided against Spain. Judge Zirpoli explicitly ruled:

> It is evident from this very case and the evidence submitted in these proceedings that plaintiffs have had and continue to have effective assistance of counsel and access to the courts. *Id.* at 546.

Judge Zirpoli, who was not insensitive to the complaints of Spain and his fellow petitioners, ordered that neck chains not be used and that any other mechanical restraints, except handcuffs, not be used unless the prisoners presented "an actual or imminent threat of bodily harm or escape." *Id.* at 547. The order applied both to Spain's treatment in San Quentin and to his treatment at the murder trial. Nonetheless, after entering this broad order, Judge Zirpoli explicitly modified it to say that it did not apply "to the state trial proceeding in the courthouse, in the courtroom in Marin County."

These rulings, made after hearings in federal court contemporaneous with the Marin murder trial, bear heavily on the credibility of Spain's present contentions. He was found able to have the effective assistance of counsel. He was found to have access to the courts. He failed to show that he was being

denied due process of law by the state of California. With full opportunity to challenge the conditions to which he was subject at the time, he was unable to show that the state had an obligation under the Constitution of the United States to remove the chains because they interfered with his right of access to the courts or his right to counsel.

It is pure speculation to suppose that *Younger v. Harris*, 401 U.S. 37, 46 (1971) inhibited Judge Zirpoli from ordering the chains off during the trial. *Younger* abstention is not absolute. Federal interventions in a state trial is entirely appropriate when "extraordinary circumstances" render the state proceeding unfair. *Id.* at 53-54; *see also Middlesex County Ethics Commn. v. Garden State Bar Ass'n.*, 457 U.S. 423, 437 (1987). No federal judge worth his salt would think it a duty to do nothing if a state prisoner was being subjected to conditions tantamount to torture. Judge Zirpoli was not a do-nothing judge. If this court's analysis of the case is correct, extraordinary circumstances justifying his intervention were present.

Rather than speculate to his reasons as the majority does at footnote 5, we may take note of Judge Zirpoli's clear distinction between the trial in his court and the murder trial in Marin. In his court the defendants were seeking benefits; they had every reason to present themselves as model prisoners. In the murder trial their objective, as Judge Zirpoli himself observed, was to frustrate the proceedings. Under those circumstances, unless due process was being denied, there was no reason for a federal court to intervene even though that court had found the chains in other circumstances to be an unconstitutional imposition.

The rationale for deference to a trial judge on credibility is the trial judge's opportunity to evaluate the live witnesses. Judge Zirpoli evaluated the very testimony on which the magistrate and the district court in this case relied. Judge Zirpoli

made these findings explicitly contradicting present Spain's claims:

> Plaintiffs were found to be in good physical condition following physical examinations by Dr. Kasch and Dr. Oliva, and psychiatric evaluations disclosed no psychoses. Findings by plaintiffs' doctors and psychiatrists to the contrary, in the court's view, were clearly controverted or at best constitute a difference of medical opinion. The allegation of improper use of drugs required competent expert testimony and no such testimony was provided by plaintiffs. Some of the plaintiffs have athlete's foot. This is not a medical problem, but rather a matter of personal hygiene.

Spain v. Procunier, 408 F. Supp. at 546.

This court now finds Spain to have had "a chronic back problem" exacerbated by the chains. This court now believes Spain's assertion of April 1975 that he was frequently experiencing "muscle cramps, spasms, and pulled muscles." This court now accepts Spain's claim that his physical condition "deteriorated markedly." This court now concludes that Spain was found to have attended his trial for seventeen months in a "physically and mentally debilitated condition." All of these conclusions are contrary to the contemporaneous findings of Judge Zirpoli.

Judge Zirpoli's explicit finding was that Spain had not shown that his physical condition was other than good. This court attempts to avoid the impact of this finding by implying that Spain could have been found in good physical condition in San Quentin while not being in good physical condition in the courthouse. It is difficult to see how his "condition" could have "deteriorated markedly," as the court finds, while he remained in "good physical condition" at San Quentin. It is difficult to see how a judge so meticulous in his findings as to

health as to note the presence of athlete's foot would have missed the major ailments Spain claims he suffered.

The magistrate found that Spain was impeded in consultation with his counsel and therefore also impeded in his ability to testify. The district court inflated the finding of the magistrate to a finding that Spain was *unable* to cooperate with his counsel. This court accepts the judgment of the district court based on these findings. All of them are contrary to the contemporaneous findings of Judge Zirpoli. The district court's inflated finding has no basis at all in the record.

These findings are also contrary to what we know from the judicial record in *Spain v. Procunier* actually happened: Chained as he was, except in the federal court itself, Spain was able to communicate with Garry and to launch a habeas corpus proceeding so successful that it at first relieved him of chains even at the Marin murder trial. A prisoner and counsel who succeed so well do not plausibly contend that they could not deliberate together or prepare together or decide together.

THE EXISTENCE OF ALTERNATIVES TO CHAINING

The majority concludes that alternatives to chaining were available, and that the district court failed to consider them. The evidence does not support this conclusion, and the defendant failed to satisfy his burden of proof on this issue. Spain offered no evidence as to what alternatives the trial court could have adopted. The magistrate made no findings on this subject. The district court found, however, that the shackles were not used as "a last resort." The district court said that the trial court "should have given the defendants a warning that if the disruptions did not cease, then shackles would be imposed." The district court accepted "the argument that complete unchaining would have worked."

Without any evidence at all, and in disregard of Spain's repeated acts of misconduct in pretrial proceedings but oper-

ating apparently on a hunch, the district court came to the conclusion that complete unchaining "would have worked." The district court did not observe that Spain had taken the position that not only must he be completely unchained but that all of the defendants must be completely unchained. Garry, his counsel, stated unequivocally to the trial court that Spain would not accept unshackling unless his codefendants were unshackled.

The district court evidently understood literally the phrase "last resort" used by the Supreme Court in *Allen*, with the implication that chains were to be applied only after other measures had been tried and failed. But the Supreme Court had spoken of chaining combined with gagging as a last resort, and it had already been made plain that the term "last resort" was not literal and that chains could be applied in cases of "extreme need." *Harrell v. Israel*, 672 F.2d 632 (7th Cir. 1982), or in cases "urgently demanding that action." *Tyars v. Finner*, 709 F.2d 1274, 1284 (9th Cir. 1983). The teaching of those cases had been summed up as meaning that shackling is "proper where there is a serious threat of escape or danger to those in and around the courtroom." *Wilson v. McCarthy*, 770 F.2d 1482, 1485 (9th Cir. 1985). The district court did not apply this standard.

The district court also drew attention to the fact that Spain had testified in Judge Zirpoli's court without chains and without misbehaving. The district court declared that this conduct "would at the least entitle him to one opportunity to show that he would not disrupt proceedings in a courtroom with many security guards present."

The district court was aided in its guessing by an erroneous understanding of the law, viz., that there was some kind of entitlement to disrupt a trial before chaining could be imposed. The district court alternatively phrased this position as an entitlement after Spain's good behavior in the federal court before Judge Zirpoli or as a general right of

defendants to be warned at least once before their disruptive behavior took place. This view of the law is squarely contrary to controlling circuit authority. *Loux v. United States*, 389 F.2d 911 (9th Cir.), *cert. denied*, 393 U.S. 867 (1968).

This court, while affirming the judgment, takes a different tack from either of those taken by the district court by stating that absence from the courtroom should have been adopted as an alternative. This court acknowledges that "some measure" was needed to maintain the security of the courtroom. But the court in this case goes directly contrary to other binding circuit precedent as to the burden of proof of the existence or absence of alternative remedies. The law of the circuit is that "it is incumbent upon the defendant to show that less drastic alternatives were available." *Wilson* at 1486. Spain prevails here having made no showing whatsoever on this issue.

Neither the magistrate nor the district judge made any findings that Spain proved the existence of alternatives that the trial judge could have adopted. Instead, this court embarks on its own fact-finding, and, searching the trial record, finds the following: (1) On November 30, 1973, in a pretrial proceeding, Spain moved in his own handwriting "for an order allowing me to remain in San Quentin." There was no indication that this waiver applied to the trial that began in 1975. (2) On January 11, 1974, Spain requested absence from a pretrial hearing. His counsel, arguing this motion, declared that if "there is any shackling whatsoever" Spain would not want to come into the courtroom. (3) On March 3, 1985, Spain requested to be removed from the courtroom. The court granted his request. (4) On March 18, 1978, Spain waived his right to be present at a pretrial hearing on March 18, 1978. (5) On April 11, 1975 Spain signed a waiver of his personal presence but his counsel represented this request as one to be excused on selected days. The court held a hearing on this motion and ruled that Spain could be absent from pretrial proceeding but must appear during jury selection and trial.

The record thus establishes that Spain moved five times to be excused from pretrial proceedings. The trial judge twice granted his motions. The trial judge denied his request to be excused on selected days during the trial. Spain did not renew that motion as the trial wore on and as, according to his testimony, the pain worsened. The cumulative effects of the restraints at trial were not presented to the trial judge. Spain does not sustain his burden even when the appellate court undertakes it on his behalf.

In concluding that absence was an acceptable alternative to shackling, the majority ignores the importance of the defendant's presence in the courtroom. Face-to-face, person-to-person confrontation of the accused by his accusers is fundamental, rooted in the demands of human nature, in ancient and long-established practice and in the Sixth Amendment. *Coy v. Iowa*, 108 S. Ct. 2798, 2801 (1988). Such a right could never have been waived by the partial, unrepeated waiver of trial presence attempted by Spain and Charles Garry.

In addition to shifting the burden of proof and deciding in favor of Spain although he has produced no evidence as to less drastic alternatives, this court has radically misinterpreted statements and action by the trial judge. This court declares that "the trial court never really considered the alternatives to shackling the defendants in order to secure the courtroom." As evidence of this conclusion, this court has gone not to any findings made below, but to the record of the state trial, and has drawn from it two statements, one made by the trial judge January 11, 1974 and the other made by him on March 24, 1975. The first statement reads: "I have to consider all of the options from the total release of restraint to continuation of the existing restraint." The second statement reads, "The court has considered every possible opportunity between freeing all or some inmate-defendants entirely from restraint, to full restraint for all inmate-defendants." Our court, having quoted those statements, goes on to say:

"These statements make it plain that the trial court actually did not consider 'all of the options.' "

Such a method of interpretation of a trial judge's statements is truly extraordinary. Black means white. The trial judge says twice that he considered *all of the options.* Our court says that these statements mean the trial judge did not consider all of the options. There is no basis in any evidentiary findings made by magistrate or district court for these unusual feats of interpretation.

If one looks at what the trial judge said and did one finds that he stated for the record at the end of the trial in 1976 that he had heard repeated motions for reconsideration of the restraints imposed "and the subject of changing the restraint condition was constantly in my mind." The testimony of Spain's counsel is that at no time did Spain "seek to waive his presence," so that alternative was not presented by motion to the court. The judge, however, on June 30, 1975 made "the ruling" that "defendants could stay at the prison voluntarily absenting themselves if they desired to do so." The clerk's minutes for that day show that Spain was not present and had filed a waiver as to being present. The burden was on Spain to produce the evidence to show whether absence as an alternative to shackling continued to be open to him. He did not do so. This court departs from controlling authority in relieving him of the burden.

CONCLUSION

John ("Johnny") Spain is a complex, intelligent human being. Through no fault of his, he was subjected to terrible suffering as a child. The outrages inflicted on him and the deep alienation he experienced in childhood undoubtedly account for the attitude he formed and the rage that was expressed in the homicidal outburst which he committed in 1967. Since that date he has spent almost all his life in prison. In recent years, according to information submitted in this

case, he has been a model prisoner. He has inspired the unswerving and devoted service of his present counsel. No human being is beyond redemption. Johnny Spain appears to be a changed man. If it were our function to exercise the powers of clemency vested in the governor of California and to forgive what he has done, we might well exercise those powers.

On the other side are the dead who were his victims and what is owed the prosecutors who worked for six years to bring a difficult case to a verdict and who have worked thereafter to keep the judgment firm. They are entitled to have their work judged in accordance with law. Respect is due also to the jurors who put aside their own lives for over a year to hear the case of Spain and his co-defendants, found some innocent and some guilty. Fairness is finally due the trial judge who cannot with decency be portrayed as a torturer; rather, he was a highly conscientious man using his best judgment in possibly life-threatening circumstances.

What is most apparent in Spain's deeply felt and continuing complaint about the chains is that he perceived them as an affront to his dignity as a human being. It was an affront to be physically restrained. But it was an affront that Spain's conduct, in the trial court's view, made necessary. It is no recognition of Spain's dignity as a human being for us to dodge the question of whose conduct made the trial judge conclude that restraints were required. Ultimate responsibility for the trial court's judgment of necessity rested with Spain.

In the end, we cannot decide the case out of compassion for Johnny Spain or out of regard for the judge. It is our task to apply the Constitution of the United States, respecting the power allotted to the states and the power allotted to federal district and appellate courts.

That a prisoner should be tried in chains is a terrible qualification of the kind of justice our courts are expected to give.

But there are worse qualifications. To have concluded that Spain was untriable would have been to invite vengeance not according to law. To have tried Spain without chains would have been to put the other prisoners, guards, prosecutors, judge and jury at risk. Sometimes we speak metaphorically of profaning the temple of justice. The temple of justice in the Marin County Courthouse had been physically profaned by violent invasion. The trial judge had no obligation under our Constitution to risk a repetition of those bloody events.

The opinion of the court says that Spain should not have been chained but tried in absentia. If that had been done the petition before us now might allege that he had been deprived of his right to confront the witnesses against him and his right to confer immediately with counsel. In retrospect as an imagined alternative this course looks far better than it would have appeared if it had actually been done. In exercising our imagination as to how it might have gone we are actually substituting one discretionary judgment for another discretionary judgment.

Contrary to controlling authority, this court has put the burden of proof as to alternatives, or their absence, upon the state. Contrary to controlling authority, this court has upheld a judgment resting on the proposition that defendants who have repeatedly disrupted pretrial proceedings must be given an opportunity to misbehave at the trial itself before they are restrained. Contrary to the findings of the federal judge who heard the live evidence, this court credits Spain's complaints. Contrary to the functions of federal courts under the Constitution, this court substitutes its discretion for the discretion of the state court that conducted the trial.

In extraordinary circumstances charged with danger the trial court balanced the risk against the harms and made a fair balance that one federal district judge found damaged neither the physical health of Spain nor his right to access to the courts nor his right to counsel. We have no authority to

second-guess the procedure chosen and to overturn a verdict of murder fairly rendered thirteen years ago.

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APPENDIX B

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION FILE NO. C-81-4858 TEH

JOHNNY LARRY SPAIN,

Petitioner

v.

RUTH RUSHEN, et al.,

Respondents.

This action came on before the Court, Honorable **THELTON E. HENDERSON**, United States District Judge, presiding and a decision having been duly rendered.

It is Ordered and Adjudged

that the petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is hereby GRANTED.

The state of California shall commence retrial of the petitioner within ninety (90) days or he shall be released from custody with respect to the conviction at issue.

Dated as **San Francisco, California,** this **22nd** day of **September, 1986.**

Filed U.S. District Court
September 22, 1986
William L. Whittaker, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHNNY LARRY SPAIN,

Petitioner ,

v.

RUTH RUSHEN, et al,

Respondents.

No. C-81-4858 TEH

OPINION AND ORDER

This case is before the court on Spain's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case is on remand from the United States Supreme Court, which reversed this court's issuance of a writ based on *ex parte* communications between a juror and the trial judge. The case is again before this court to determine whether the writ should issue on the ground that petitioner was unconstitutionally shackled during the duration of his seventeen month trial.

I. INTRODUCTION

At the outset, this court recognizes that petitioner's pre-trial and trial proceedings took place during extremely trying times. They were times of great passion over politics and social conditions, sometimes leading to the use of unlawful violence in pursuit of political ends. The State urged the trial judge to consider recent violent

incidents at other state courts. (CT 1084.) Because of the background of petitioner's case, there was concern that such violence might erupt in this case, which was seen by many in a political context. (CT 1165-66.) In the face of that possibility, the trial judge was rightly concerned about how to ensure the safety of all who appeared in his court.

The court has reviewed the petition in light of these legitimate concerns. However, the court is also mindful of its duty to protect and vindicate individual rights and the constitutional guarantees that ensure our ultimate freedom. Thus, this court's only role is to examine whether the individual petitioner, Johnny L. Spain, received his constitutional rights to due process and effective assistance of counsel during the trial that resulted in his conviction on two counts of murder and on conspiracy to escape. The question before us is not whether Spain was guilty or innocent of the crimes charged, but simply whether he was tried fairly and in accordance with constitutional standards.

After careful consideration of the record before this court, including the parties' briefs and the Magistrate's evidentiary findings, and the law, this court finds that the petitioner was deprived of his Fourteenth Amendment

rights due process and effective assistance of counsel. Accordingly, the court is compelled to issue the writ of habeas corpus for the reasons set forth below.

II. FACTUAL BACKGROUND

On October 1, 1971, the Marin County Grand Jury filed an indictment charging petitioner Johnny L. Spain with five counts of murder, in violation of California Penal Code § 187; one count of conspiracy (§ 186) to escape (§ 4530(a)), to possess a firearm (§ 4574), and to kidnap (§ 207); and one count of assault with a deadly weapon by a life prisoner upon a non-inmate (§ 4500). Six others (Stephen M. Bingham, David Johnson, Hugo A. Pinell, Fleeta Drumgo, Luis N. Talamantez, and Willie Tate) were charged with these and other offenses in the indictment. The offenses charged arose from events at San Quentin State Prison in August 1971, which resulted in the death of inmate George Jackson and five others. At the time the events occurred, petitioner Spain was incarcerated on a life sentence for first degree murder.

The trial began on March 25, 1975, and ended on August 12, 1976, after twenty-four (24) days of jury deliberation. Three of the six[1] defendants were acquitted

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[1]Although seven people were indicted, only six defendants were tried together since Stephen Bingham was

on all counts. One was convicted of one count of assault, and another of two counts of assault. Only petitioner Spain was convicted of conspiracy and, on a theory of vicarious liability, of murder of two of the three correctional officers who died.

From his indictment in October 1971 through his conviction in August 1976, petitioner was shackled during all of his state court appearance. According to the Magistrate's Findings, prior to leaving his cell each morning, Spain, like the other incarcerated defendants, was placed in leg irons, neck chain, and belly chains, and his hands were bound to his waist chain through the use of additional chains and handcuffs. Petitioner was continuously shackled 10-12 hours every court day. The weight of the chains was approximately 25 pounds. Only the neck chain was removed when Spain was in the courthouse holding cell during recesses, lunch, or before the trial began each day. However, in the holding cell, Spain was shackled with an "elephant chain," a 2 1/2 foot long chain attached to a steel strip in the floor of the cell. Because of the short length of the elephant chain, Spain could not stand upright in the holding cell.

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a fugitive at the time of petitioner's trial. Bingham was tried and acquitted on these charges in state court in 1986.

The Magistrate made the following findings as to the physical effects of the chains:

> There were seven or eight inches of chain between each of Spain's handcuffs and his waist chain. In order to write while chained, Spain had to reach out and up from the waist chain. Because his handcuff was connected to the waist chain, such movement would dig the waist chain into the side of his waist opposite his writing hand. The same dynamic obtained when Spain tried to scratch his nose or ear.
>
> The chains caused pain in Spain's wrists, around his ankles and waist. He resorted to wearing ace bandages under the handcuffs, but the bandages in turn caused circulation problems. The waist chain rubbed his waist "almost raw." The padlocks used to connect the handcuffs and neck chain to the waist chain "would bear into my back with every movement of the chain."
>
> [Citation to Transcript omitted.)

Magistrate's Evidentiary Report (October 9, 1985), at 4.

Spain also suffered from hemorrhoids at the time and complained throughout the trial of lower back pain, weight loss, wrist and ankle pains, and headaches. Based on the evidence placed before the Magistrate, and her conclusion that petitioner's testimony was credible, this court finds, as did the Magistrate, that petitioner's shackling at trial aggravated his existing medical and psychological problems, and pained and preoccupied him during that time. As the Magistrate also found, the chains also inhibited defense counsel's ability to prepare petitioner to

testify and affected petitioner's decision not to take the stand.

Given the serious physical and psychological consequences of the shackling, defendants' counsel made numerous motions for unshackling, both before and during trial. Defendant Drumgo filed a motion to be unshackled on January 31, 1972, and defendant Talamantez filed a similar motion on March 31, 1972. Hearings were held on those motions on April 7 and 14, 1972, during which several defendants, including petitioner and defendant Johnson spat on the presiding judge. Further motions were filed on May 18 and 31, 1973. At the June 1, 1973, hearing on the motion, defendants were again removed because of disruptions, primarily caused by defendant Pinell. On June 25, 1973, the motions for unshackling during pretrial proceedings were denied.

Further motions for unshackling during trial were filed on September 14, 1973, and a hearing was held on January 11, 1974. The court denied petitioner's request to address the issue form the witness stand. Defendants Pinell and Johnson disrupted the proceedings and had to be removed. Although no ruling was made, defendants continued to be shackled and a motion to reconsider was filed on March 7, 1975. The March 14, 1975, hearing on

the motion was disrupted by petitioner and defendant Pinell. On March 24, 1975, the motion to unshackle was denied.

During the trial, on March 2, 1976, defendants moved for an acquittal on the ground that the shackling order violated *People v. Duran,* 16 Cal.3d 282 (1976).[2] The motion was denied on April 6, 1976.

All inmate-defendants thus remained shackled throughout the entire proceedings.

III. PROCEDURAL BACKGROUND

The jury found petitioner guilty of two counts of murder, and of conspiracy to escape on August 12, 1976. On October 1, 1976, petitioner's motion for a new trial was denied, and he filed a notice of appeal to the California Court of Appeal on the same day. Nearly four years later, the Court of Appeal affirmed the judgment of convictions of petitioner and two other convicted defendants in *People v. Spain, Pinell and Johnson,* No. 1 Crim. 16126 (Cal.Ct.App., 1st App.Dist., filed July 24,

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[2]In *Duran*, the California Supreme Court held that "a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints." 16 Cal.3d at 290-91.

1980). The California Supreme Court denied a hearing on October 15, 1980.

Petitioner filed a petition for writ of habeas corpus in this court on June 29, 1981, which was eventually dismissed for failure to exhaust state remedies as to the shackling issue. On December 31, 1981, after exhausting state remedies, petitioner filed a second petition for writ of habeas corpus. This court granted that petition on June 29, 1982, based on *ex parte* communications between the judge and a juror. *Spain v. Rushen,* 543 F.Supp. 757 (N.D.Cal. 1982). The court ordered the State of California to retry petitioner within 90 days or release him from custody with respect to the convictions at issue in this case. The State appealed the decision.

On January 24, 1983, the Court of Appeals for the Ninth Circuit affirmed the Order of this court, and a petition for rehearing was rejected on March 17, 1983.

On December 12, 1983, the United States Supreme Court summarily reversed the judgment of the Ninth Circuit which had affirmed this court's Order granting habeas corpus relief. *Rushen v. Spain*, 464 U.S. 114 (1983). The Supreme Court remanded the matter to the Ninth Circuit for further proceedings on the shackling

issue. On March 14, 1984, the Ninth Circuit remanded the matter to the District Court.

On January 28, 1985, this court granted petitioner's request for an evidentiary hearing on the shackling issue, and referred the matter to Magistrate Joan S. Brennan. Magistrate Brennan held a hearing on April 17 and 18, 1985, and issued her Findings on October 9, 1985.

After extensive briefing by the parties, the matter was submitted to this court on January 24, 1986.

IV. LEGAL STANDARD FOR SHACKLING DEFENDANTS

"In an unbroken line of precedents and treatises from Hale to Hawkins through Blackstone . . ., the principle is reiterated that the defendant shall not be shackled or manacled during his trial." Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis Univ. L.J. 351, 352 (1971). In a more recent opinion, the Supreme Court held that no defendant should be tried while shackled except as a last resort. *Illinois v. Allen,* 397 U.S. 337, 344 (1970). Shackling of a defendant may deprive him of his constitutional rights to due process, presumption of innocence, and effective assistance of counsel, as well as constitute punishment before conviction. The Supreme Court explained the dangers of shackling:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.

Thus, it is impermissible to shackle a defendant without a showing of manifest necessity. *Tyars v. Finner,* 709 F.2d 1274, 1284 (9th Cir. 1983).

In order to establish such necessity, a court must find that three conditions have been met: First, shackles are a last resort, and may be used only if there is no less restrictive alternative. *Allen*, 397 U.S. at 344; *Tyars*, 709 F.2d at 1284. Second, the showing of necessity must be individualized. *Woodards v. Cardwell*, 430 F.2d 978, 982 (6th Cir. 1970), *cert. denied,* 401 U.S. 911 (1971); *Harrell v. Israel,* 672 F.2d 632, 635-636 (7th Cir. 1982). Third, the shackles must be as inconspicuous as possible. *Harrell*, 672 F.2d at 636-637; *Brofford v. Marshall,* 751 F.2d 845, 854, 856 (6th Cir.), *cert. denied,* 106 S.Ct. 194 (1985).

First, as the Supreme Court announced in *Allen,* shackles may be used only as a "last resort," when no other less drastic alternatives will suffice. *Tyars*, 709 F.2d at 1284. Where security precautions are necessary,

alternatives must be tried, even at additional cost to the state, before a defendant may be shackled. *Kennedy v. Cardwell*, 487 F.2d 101, 111 (6th Cir. 1973), *cert. denied sub nom., Kennedy v. Gray,* 416 U.S., 959 (1974). In *Kennedy*, the court suggested a trial judge consider such factors as the layout of the courtroom and courthouse, the physical condition of the defendant, and the availability of additional guards, in determining whether less drastic security measures might suffice. *Id.* at 110-11. *See also, Woodards,* 430 F.2d at 978 (court affirmed the granting of habeas corpus relief because the state court failed to explore reasonable alternative methods of security); *Hardin v. Estelle*, 365 F.Supp. 39, 47 (W.D. Tex.), *aff'd. without reaching the issue,* 484 F.2d 944 (5th Cir. 1973) (court granted habeas corpus petition because there were "numerous ways in which the courtroom could have been made temporarily safe, and the rights of the petitioner protected, without the use of shackles.").

Second, the showing of necessity must be individualized in that the court must determine the likelihood that a particular defendant might attempt to escape, injure others, or disrupt the courtroom proceedings if left unfettered. *Woodards,* 430 F.2d at 982. For example, a defendant may not be shackled simply

because of his membership in a class such as prison inmates. *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *Harrell*, 672 F.2d at 635-36. However, a court may consider individual conduct, such as the number and nature of teh defendant's previous offenses and instant charges, *Kennedy*, 487 F.2d at 110; the risk that the defendant may try to escape, *Billups v. Garrison*, 718 F.2d 665, 668 (4th Cir. 1983), *cert. denied*, 105 S.Ct. 91 (1984); and, shouting or other obstreperous conduct, making the trial of the case difficult or impossible, *Allen*, 397 U.S. at 343.

Finally, a court must exercise its discretion to ensure that any shackles used are as inconspicuous as possible. *Harrell*, 672 F.2d at 636-637. The court in *Harrell* praised the trial judge for preventing the jury from becoming aware of the restraints, and discussed the significance of that effort:

> In all of the previous cases, little or no attempt was made to hide from the jury the fact that the accused or his witness was shackled. This distinction is by no means insignificant. For the harm to be avoided in this situation is not the shackling itself but the prejudice that could result if the jury were allowed to continuously view the defendant restrained in that manner. Such a sight, it is feared, could instill in the jury a belief that the defendant is a dangerous individual who cannot be controlled, an idea that could be devastating to his defense.

Harrell, 672 F.2d at 636-37.

Thus, even where there is a showing of extreme necessity, the trial court must take great care to ensure that the use of restraints are not obvious to the jury. In *Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984), heavy security measures were necessary where death threats had been made against the trial judge and a witness to the state, and two women were kidnapped and offered as ransom for the release of one of the defendants. Nevertheless, even in that case, the defendant's handcuffs were removed as soon as he was brought into the courtroom, and potential jurors gathered only a brief glimpse of defendant in the handcuffs. *Id.* at 1413. *See also Brofford v. Marshall*, 751 F.2d at 856 (an adequate showing was made to justify the "relatively inconspicuous" and "minimally restrictive" use of leg restraints); *Billups*, 718 F.2d at 667 (jurors may have seen defendant in restraints, but only on one occasion).

V. STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), a state court's factual findings are entitled to a presumption of correctness, unless, *inter alia*:

> (1) . . . the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) . . . the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

> (3) . . . the material facts were not adequately developed at the State court hearing;
>
> (6) . . . the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) . . . the applicant was otherwise denied due process of law in the state court proceedings.

In this case, the state argues that the trial court made factual findings, and this court is required to defer to them. At the end of the trial, the trial judge did explain that his decision to continue shackling the defendants was based on incident reports he received throughout the trial concerning misconduct by petitioner and potential threats to the security of the courtroom. The judge made these reports part of the record, and they were submitted to this court as Exhibits 17 and 18. However, in *Zygadlo v. Wainwright*, 720 F.2d 1221, 1222 (11th Cir. 1983), *cert. denied,* 466 U.S. 941 (1984), the trial judge set forth reasons for shackling the defendant both before and after the defendant had been convicted. The Eleventh Circuit refused to consider the grounds offered by the trial judge only after the trial was concluded:

> Because Zygadlo had no opportunity to contest the validity of the additional factors before trial, we do not rely on them in reaching our decision.

Zygadlo, 720 F.2d at 1222, n.3.

Similarly, this court cannot rely on the trial judge's statements after the trial as to the factors he relied on in chaining petitioner when petitioner was not given an opportunity to contest their validity.

Moreover, the incidents listed in the report only addressed behavior by the defendant after the original decision to shackle had been made an re-affirmed several times. In light of these facts, since the court never held an evidentiary hearing nor even let petitioner dispute the unsworn allegations in the incident reports, this court finds that petitioner did not receive a "full, fair, and adequate hearing" in state court as to whether his conduct required his physical restraint. Thus, the state court's implicit "findings" of necessity are not entitled to a presumption of correctness. *Boyd v. Dutton,* 405 U.S. 1 (1972). Consequently, the petitioner has only the burden of proving, by a preponderance of the evidence, the facts supporting his substantive federal claim. *Birt v. Montgomery,* 709 F.2d 690, 696 (11th Cir. 1983), *cert. denied,* 105 S.Ct. 232 (1984).

In addition, a federal court must not defer to a state court's findings of law, but rather has the duty of applying applicable federal law independently. *Townsend v. Sain*, 372, U.S. 293, 318 (1963). For example, whether a

violation of petitioner's constitutional rights was harmless beyond a reasonable doubt is a question of federal law. *Chapman v. California*, 386 U.S. 18, 21 (1967) ("Whether a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights is very bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.").

Finally, if a state court has applied incorrect legal standards, then a federal court cannot infer factual findings from the court's ruling. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983); *LaVallee v. Delle Rose,* 410 U.S. 690 (1973). In this case, the state court apparently erroneously believed shackles could be imposed constitutionally in the absence of a showing of extreme necessity -- perhaps because a defendant has no right to stand trial unfettered, or because all prisoners can be shackled, or because all defendants in a case should be shackled if one needs to be. (RT 2685, 2880, 2938, 2967-71, 2981). Moreover, the state court apparently did not consider itself bound in its use of shackles by the principles of "last resort," "less drastic alternatives," or "most inconspicuous" restraints. Thus, since petitioner and his co-defendants were "restrained initially by reason of

their number and their violent past," (see Respondent's Post Hearing Brief at 2), without regard to the above limiting principles, then this court cannot infer that the state court made a factual finding of the constitutionally required "necessity" before restraining this petitioner in particular.

Consequently, because the trial court never held a hearing to determine necessity and because it applied the incorrect legal standard, this court must make a *de novo* review of the necessity of the shackling of petitioner.[3] Where the state court has not had a hearing to determine the facts reliabily, the petitioner has a right to have the federal court try the facts anew. *Townsend v. Sain*, 372 U.S. at 318. In this case, a hearing was held before the Magistrate on the issue of potential prejudice caused by the chaining. The Magistrate did not address the issue of "necessity" because petitioner agreed to submit that

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[3]The state Court of Appeal accepted as correct, for the purposes of the decision, that the trial court had made no finding of a "manifest necessity." (Court of Appeal Opinion at 2). Thus, since the appellate court did not conclude that a showing of necessity could be inferred from the trial record, that court's decision does not constitute a state factual finding. *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981).

issue to this court based on documentary evidence. As petitioner explained,

> The factual record before Judge Henderson, which comprises the entire record of state court proceedings, is sufficient to permit him to resolve the issue of whether petitioner's shackling was constitutionally justifiable.

Petitioner's Prehearing Brief, filed on April 10, 1985, at 2. *See also*, Petitioner's Brief on Evidentiary Issues, filed on March 7, 1985, at 5.

Thus, this court will determine whether the shackling was necessary based on a *de novo* review of the state court record and the application of the correct legal standard. If it was error to chain petitioner, this court must also determine whether such error was harmless based on the factual findings made by the Magistrate.

VI. WAS IT ERROR TO CHAIN SPAIN?

As discussed above, no defendant should be shackled without a showing of manifest necessity. Since the state court did not hold an evidentiary hearing on that issue and erroneously believed it had the discretion to impose shackles without such a showing, this court must make an independent determination of necessity based on the record before it.

A. Less Restrictive Alternatives

First, the shackles were not used as a last resort and the trial court did not attempt to implement less

restrictive alternatives initially. The disruptions and incidents the trial judge relied on in his post-trial justification of the shackling (Exhibit 17 and 18) all occurred during trial. Petitioner, however, had been chained for many months prior to trial and continued to move for unshackling throughout that pre-trial period. Thus, incidents that occurred during the trial can not justify the "necessity" of chaining petitioner before trial. Moreover, even though the government cites disruptions in part caused by petitioner during pre-trial proceedings, it is unclear to what extent petitioner was responsible for those incidents, as opposed to his co-defendants, and whether those incidents were threats to court security. Certainly, since petitioner and his co-defendants were chained from the first court appearance, the trial court apparently did not view shackling as a last resort. Even given the disruptions during the pre-trial appearances, since they did not threaten the safety of those in the courtroom, it would have been reasonable -- and thus was required -- for the trial court first to try less drastic alternatives.

For example, the court should have given the defendants a warning that if the disruptions did not cease, then shackles would be imposed. Rather, defendants were

never given such a chance despite the fact that petitioner promised to behave if the shackles were removed (RT 2948). Several reasons prompt this court to accept the argument that complete unchaining would have worked and thus there was no manifest necessity for shackling petitioner.

First, petitioner had recently appeared in a federal court trial without any restraints or extraordinary security and behavior was exemplary. Such recent behavior in another court should have at least warranted giving petitioner one chance to prove he would conduct himself properly if unshackled. The government argues that petitioner's behavior in federal court, where he had an incentive to cooperate, is not dispositive of whether chains were necessary in petitioner's state court criminal prosecution. Nevertheless, it would, at the least, entitle him to one opportunity to show that he would not disrupt proceedings in a courtroom with many security guards present.

Second, co-defendant Tate was eventually unchained after he was released from prison. Although Tate had been as disruptive as Spain before his release, once unshackled, Tate behaved properly and the court found no reason to reimpose restraints on him. Clearly, as the state

court learned, there was no "necessity" in chaining Tate. Even in *Illinois v. Allen,* 397 U.S. 337, 346 (1970), a case in which the Supreme Court found shackles would have been justified, the defendant was removed from the courtroom only after several warnings about misbehavior and after being told that the sanctions would end if "he would agree to conduct himself in an orderly manner." Similarly, petitioner should have been given the opportunity to show that the restraints were unnecessary.

Third, even the trial judge acknowledged that the chains themselves may have prompted some of the disruptions, as they were the cause of a lot of anger, humiliation, and pain for petitioner and his co-defendants. (RT 2970, 2987-8). The weight and number of chains used were a punishment in themselves, and less restrictive chains would have accomplished the same purpose. In particular as to petitioner Spain, the chains exacerbated his medical problems and caused severe pain. (Magistrate's Evid. Report at 12). Nevertheless, despite the pain and humiliation, throughout 203 days of trial, the government points to only three instances in which petitioner misbehaved in front of the jury (see Exhibits 17 and 18.). Under the circumstances, it is reasonable to surmise that had petitioner not been shackled, or shackled

with less burdensome restraints, even those three incidents would not have occurred.

Finally, the court could have used more guards in the courtroom in order to ensure security in a less restrictive manner. Shackling is a last resort, not the first.

In light of these considerations, this court finds that heavy shackles were imposed in the first instance, not as a last resort, where various less restrictive alternatives would have sufficed. Thus, the state fails to establish that the first requirement to demonstrate "necessity" was fulfilled.

B. Individualized Determination of Necessity

The second requirement to show that necessity of shackling requires the court to make a finding that the particular defendant is likely to attempt to escape, injure others, or disrupt the court proceedings. A defendant may not be shackled based on his or her mere association with others. For example, the chaining of one defendant may not be justified merely by the desire to protect the fair trial rights of a co-defendant who does require shackles.

In this case, the trial court declined to treat each defendant individually. The court was apparently concerned that unchaining those inmates who it thought

posed no threat would prejudice the others who remained chained. The trial judge stated, "[I]f I don't treat all the same, then . . . that can't help but affect a jury." (RT 2981). The trial judge was apparently willing to sacrifice petitioner's right to a fair trial in order to preserve the co-defendants' rights. However, when co-defendants' rights are in direct conflict, and can only be cured by a severance, such action is constitutionally required.[4] *Bruton v. United States,* 391 U.S. 123 (1968); *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). Thus, the trial court impermissibly tried all defendants in this case together when some of them would not otherwise have needed to be chained.

In addition, this court reasonably infers from the record that the trial judge shackled petitioner and his co-defendants because of their status as prisoners. While all of the defendants were inmates, they were all chained. However, after defendant Tate was released from prison in December 1974, he was permitted to attend court sessions unshackled, which he did for the duration of the

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[4]Defendant Pinell, at whom the prosecution directed most of its arguments for chaining, moved to sever so that he and his co-defendants would not all have to stand trial chained (CT 2343-45). The state opposed that motion (CT 2426-27).

trial. Such shackling of all inmates automatically is unconstitutional. In *Harrell v. Israel*, 672 F.2d 632, 635 (7th Cir. 1982), the court found

> [I]t appears that [in this case] the trial court's shackling order was intended as part of a new policy to be followed in all future cases involving prison inmates. Such a policy would seem inconsistent with previous decisions in this and other circuits. *See United States v. Esquer; Kennedy v. Cardwell; United States v. Samuel. See also People v. Duran*, 16 Cal.3d 282, 127 Cal.Rptr. 618, 545 P.2d 1322, 90 A.L.R.3d 1 (1976); *State v. Hartzog*, 26 Wash.App. 576, 615 P.2d 480 (1980).

Harrell v. Isarel, 672 F.2d at 636.

See also United States v. Samuel, 431 F.2d at 615.

In light of the circumstances, this court finds that it is likely that the decision to shackle was based on petitioner's status as a prisoner, rather than on any evaluation of his individual propensity for violence and likelihood of disrupting the courtroom or escaping, as the government alleges.

In either case, if the shackles were imposed because petitioner was an inmate, or because his co-defendants needed to be shackled, the state court failed to make the required individualized determination of necessity.

C. Least Conspicuous Chains

The more extreme degree to which a defendant is restrained and the more obvious the use of such restraints becomes to a jury, the greater the showing of necessity is required. Unlike the minimally restrictive chains which the court in *Brofford v. Marshall*, 751 F.2d at 856, found constitutionally justified, the restraints in this case weighed 25 pounds and consisted of leg irons, neck chain, belly chains, handcuffs, and a waist chain. Petitioner and his co-defendants were continuously chained and the jury could not fail to notice. The trial judge tried to minimize the humiliation of the defendants by bringing them into court before the spectators were allowed in the courtroom. Nevertheless, petitioner's trail attorney alleged at the time of the trial judge's post-trial justification of the shackling that the defendants had, at times, been brought into the court within the full view of the spectators (RT 24004). In either case, the excessive and uninterrupted use of maximum physical restraints on petitioner could not have escaped the jury's notice. Apparently, there was no effort by the Judge to reduce the amount of chaining in order to make it as least conspicuous as possible in front of the jurors.

D. Shackling Was Error

For all the foregoing reasons, it is clear that there was no manifest necessity to shackle petitioner. The court failed to consider or utilize less drastic alternatives, but rather shackled petitioner as a first resort. The court failed to make an individualized determination of necessity, but rather based the decision to shackle on the fact that some of the co-defendants needed to be shackled and on the fact that petitioner was an inmate. Finally, the court failed to ensure that the restraints used were as inconspicuous as possible.

VII. WAS THE SHACKLING PREJUDICIAL ERROR?

Most courts have held that shackling is inherently prejudicial and thus may be justified only under the limited circumstances described above. In *Kennedy v. Cardwell,* the court noted the "inherent prejudice" of shackles because the defendant "is cast in the jury's eyes as a dangerous, untrustworthy and pernicious individual from the very start of the trial." 487 F.2d at 111. *See also Woodards v. Cardwell*, 430 F.2d 978, 982 (6th Cir. 1970) ("All authorities agree that it is prejudicial for a defendant on trial to be shackled in the courtroom."); *United States ex rel. Boothe v. Superintendent,* 506 F.Supp. 1337, 1341 (E.D.N.Y. 1981) ("Courts generally do not

require shackled defendants to make a specific showing of prejudice.").

Nevertheless, the California Court of Appeal found that even if the shackling was illegal, the error was proved harmless by the acquittal of other shackled defendants. *California v. Spain,* 1 Crim. 16126 (Cal. Ct. App., 1st App. Dist., filed July 24, 1980) at 20. Thus, we address the issue of harmlessness, which the state argues prevents this court from reversing petitioner's conviction even if the trial court abused its discretion in shackling.

A. Burden of Proof

The state must prove the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967). The state argues that the shackles did not prejudice the jury since two of petitioner's shackled co-defendants were acquitted and all of them, including petitioner, were acquitted on at least some of the counts. Therefore, the state argues, the jury disregarded the shackles and assessed the evidence fairly by acquitting petitioner and his co-defendants of 39 out of 45 counts.

However, the state's argument misses the point. The shackles unconstitutionally shifted the burden of proof to petitioner to prove his innocence. *Harrell,* 672 F.2d at 635; *Estelle v. Williams,* 425 U.S. 501, 503 (1976). The

fact that petitioner and his co-defendants were acquitted on some charges is not proof beyond a reasonable doubt of the harmlessness of the unconstitutional shackling. Rather, it may only mean that the defendants were able to carry the burden of proof on some charges but not on others.

Petitioner presents a compelling hypothetical to demonstrate the danger of assuming harmlessness simply because of acquittal of some defendants or on some charges. Assume there are two defendants on trial on the same charges. The evidence against defendant A is flimsy. The evidence against defendant B is more substantial but it is still insufficient to constitute proof beyond a reasonable doubt. Assume the court incorrectly places the burden of proof on defendants. A is acquitted; B is convicted. Was the burden of proof instruction harmless as to B? Certainly not. Even though A was able to prove her innocence, that clearly does not mean that B would have been convicted if the state had been required to prove his guilt beyond a reasonable doubt. *See e.g., Connecticut v. Johnson,* 460 U.S. 73, 85-6 (1983).

Consequently, the state cannot rely on the fact that others were acquitted to prove the harmlessness of the unconstitutional shackling of petitioner.

The state also argues that the shackling was harmless because the jury knew from the evidence that petitioner was a prisoner of a maximum security facility. Therefore, the jury would expect "adequate security measures would be taken." *Harrell,* 672 F.2d at 638. However, there is certainly a distinction between providing security measures, which may mean only additional guards, and the maximum and continuous use of physical restraints employed on petitioner. Moreover, simply because one is an inmate would not necessarily indicate to the jury the state's opinion as to the defendant's current propensity for violence. On the other hand, the shackling immediately makes the defendant look "dangerous, untrustworthy and pernicious". *Kennedy*, 487 F.2d at 111. The extent of the impact of the shackling cannot be minimized simply because the jury already knew the petitioner was an inmate. *See Samuel*, 431 F.2d at 615 (not every defendant who is in custody and in a penal institution should be tried before a jury while shackled).

B. Preparation of Defense and Effective Assistance of Counsel

This court finds the evidence to show that petitioner was, in fact, actually prejudiced and deprived of a fair trial, as required by the Constitution. First, the shackles impeded petitioner's ability to prepare his own defense

and his right to effective assistance of counsel. Second, the shackles prevented petitioner from taking the stand in his own defense.

The Sixth Amendment guarantees the right to effective assistance of counsel. Such assistance requires that a defendant be able to participate in the preparation of his own defense. In this case, the shackles seriously impaired petitioner's ability to help prepare his own defense and thus deprived him of a fair trial.

After an evidentiary hearing in which the Magistrate assessed the credibility of the witnesses, she found that petitioner was so preoccupied by the chains that he was unable to cooperate with his attorney during trial. The Magistrate based this conclusion on several facts that demonstrate the extent of petitioner's preoccupation.

First, petitioner continually made contemporaneous statements concerning the effect of the shackles. In his July 1975 habeas corpus petition to have his shackles removed, petitioner stated:

> "I am in constant pain and discomfort. . . . I get exasperated and cannot concentrate . . . . I cannot endure the pain. If I were permitted to stand up and move my body for a moment or two every fifteen or twenty minutes, then I could endure the trial. . . .

Magistrate's Evid. Report at 8-9.

Second, petitioner testified (without restraints) in federal court before Judge Zirpoli concerning his treatment in state court:

> "We have been put in the position where we have been asked to prove we are human beings. I find that degrading in itself, because I don't feel I have to prove that I am a human being. But to . . . accept it as it is okay, go ahead and prove you are a human being, and here are the defendants in this case, (and the prosecution) saying that we don't want to give them the chance to prove that they are humans, we want the court to accept our word that they are animals."

Magistrate's Evid. report at 9.

Third, while he was shackled, petitioner undertook a course of study of the history of shackling. (Magistrate's Evid. Report at 9).

Fourth, at the time of sentencing, petitioner focused first on his shackling in his personal statement to the court. (Magistrate's Evid. Report at 9).

The Magistrate found that this preoccupation impeded petitioner's ability to cooperate with his counsel because he resented that his attorney was not doing enough to release him from the chains. (Magistrate's Evid. Report at 9). Petitioner's attorney, Mr. Garry, who ever saw petitioner out of chains, testified that "more than three-quarters . . . of [their time together] was [spent] talking about how he was being treated . . . how degraded

he felt [when he walked into the courtroom]." (Magistrate's Evid. Report at 10).

The state argues that the "record is replete with instances in which petitioner was vitally concerned with legal issues and strategy." (Respondents' Post-Hearing Brief at 33). However, the instances noted by the state all occurred, with one exception, in 1972--early in the history of the proceedings. After three years of shackling, petitioner's ability to participate in his defense had greatly diminished.

Based on the evidence of petitioner's preoccupation and the Magistrate's assessment of the credibility of the witnesses, this court accepts the Magistrate's Finding that petitioner's shackling interfered with his ability to communicate with his trial counsel and to participate in the preparation of his own defense. Thus, because the shackling deprived petitioner of his right to effective assistance of counsel, the shackling of petitioner constituted prejudicial error.

C. Ability to Testify

Not only did the shackles unconstitutionally place on petitioner the burden of providing his innocence, as discussed in Part A above, but at the same time, it deprived him of his ability to do so.

Obviously, as the Magistrate found, the chains did not per se preclude petitioner's testimony in his own defense: three of his co-defendants testified while shackled. (Magistrate's Evid. Report at 10). However, petitioner's particular circumstances--his preoccupation with the shackles and his medical problems--render reference to petitioner's co-defendants' ability to testify irrelevant. Petitioner was especially susceptible to the pain and humiliation that testifying would have caused him.

Moreover, as discussed in Part B above, the shackling of petitioner impeded his ability to cooperate with his counsel. Since his attorney, Mr. Gary, was unable to communicate with and prepare petitioner to testify, he did not put him on the stand despite his experience that the jury usually wants to hear from the defendant (Magistrate's Evid. Report at 11-12).

The state argues that petitioner made a strategic decision not to testify because his defense that he was unconscious during the crucial period would have added nothing to the testimony of his experts and would have subjected him to a devastating cross-examination. (Respondent's Post-Hearing Brief at 37). However, petitioner's counsel points out that there were a number of issues for which petitioner's testimony might have been

crucial. For example, petitioner only claims to have been unconscious at the time of the prison violence. However, he could certainly have answered questions concerning his knowledge about the evidence against him, such as the bars of soap found in his cell. If he had testified that he was not aware of their contents, it would have then been up to the jury to assess his credibility. In addition, if petitioner testified that he had run from the Adjustment Center to avoid violence by other inmates, or if he had no reason at all for running, and the jury had found him credible, then his testimony would have been extremely probative on the conspiracy charge.

Thus, it follows that since the illegal shackling of petitioner actually affected his ability to testify, the error was prejudicial. As the Magistrate found, petitioner had a right to make the choice whether to take the stand in his own defense. By interfering in this choice, the state deprived petitioner of his constitutional right and may have prejudicially affected the outcome of his trial.

VIII. CONCLUSION

As this court has once before had occasion to note in this case, it is only the greatest reluctance that we intrude upon a state criminal proceeding. *Engle v. Isaac,* 456 U.S. 107 (1982). Nevertheless, the egregious

circumstances of petitioner's shackling compel our intrusion once again. Petitioner was subjected to the maximum use of physical restraints which caused him severe pain and humiliation. The state court imposed those restraints as a first resort, not a last one, and never gave petitioner the opportunity to show that he would behave appropriately if treated with dignity. The trial court also failed to make an individualized determination of the necessity of shackling. Such unjustified use of conspicuous restraints is unconstitutional. Moreover, because the restraints prevented petitioner from testifying at trial and from receiving effective assistance of counsel, the shackling constituted prejudicial error.

Accordingly, the petition for writ of habeas corpus is GRANTED. California shall commence retrial of the petitioner within ninety (90) days or he shall be released from custody with respect to the conviction at issue. The

Court is aware that the petitioner may face continued incarceration stemming from another conviction.

IT IS SO ORDERED.

DATED: September 22, 1986

/s/

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHNNY SPAIN, Petitioner-Appellee v. RUTH L. RUSHEN, Director California Department of Corrections, Respondent-Appellant.	No. 86-2687 D.C. No. CV-81-4858-TEH ORDER

Before: HALL, KOZINSKI, NOONAN, Circuit Judges.

The full court has been advised of the suggestion of rehearing en banc and a majority of the judges of the court has voted against it. Fed. R. App. P. 35 (b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED U.S. Court of Appeals
December 8, 1989
Cathy A. Catterson, Clerk

APPENDIX D

SEE DISSENTING OPINION

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHNNY LARRY SPAIN, HUGO A. PINELL and DAVID JOHNSON, Defendants and Appellants.	1 Crim. 16126 (Sup. Ct. No. 4094)

Appellants Spain, Pinell, and Johnson, three other state prisoners, and an attorney (who remains a fugitive from justice) were charged with a multi-count indictment with offenses arising from a disturbance at San Quentin Prison on August 21, 1971. The disturbance was triggered by prisoner George Jackson who was killed while fleeing from the prison's "Adjustment Center." Also killed were three correctional officers and two other prisoners.

Lengthy and various pretrial proceedings were followed by a trial by jury which, after three months of jury selection, began with the presentation of evidence in July 1975, and concluded with final arguments in July

1976. The jury deliberated for 24 days before finding appellants guilty as set forth below and acquitting their codefendants. Appellants Pinell and Spain were sentenced to life imprisonment (Pinnell was already serving an indeterminate sentence of a term of years to life and Spain a life term). Appellant Johnson, who had spent more time in custody awaiting trial then the determinate sentence for the crime of which he was convicted, was granted probation.

Spain

Johnny Larry Spain was found guilty of the first degree murders (Pen. Code § 187) of two of the three correctional officers who were killed, and conspiracy to escape by force or violence (Pen. Code, §§ 182, 4530, subd. (a).) There was no substantial evidence that Spain personally committed the murders; instead, the evidence pointed to George Jackson as the killer. Spain's guilt of the murders was based on a theory of vicarious liability: that the murders were the probable consequence of his and Jackson's conspiracy to escape. His acquittals of the murders of the third correctional officer and of the prisoners were consistent with this theory, the evidence indicating that it was someone other than Spain or Jackson who killed the third officer and the prisoners.

Because of the manner in which the indictment was framed,[1] it was necessary (and the trial court so ruled and instructed the jury) for the prosecution to prove that before August 21, there was a conspiracy between Jackson and one Stephen Bingham to effect Jackson's escape and that on August 21, Spain joined that conspiracy. In other words, if there were no conspiracy between Jackson and Bingham, then there was no conspiracy for Spain to join, he was not guilty of conspiracy and, therefore, not legally accountable for the murders.

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[1]"The Grand Jury of the County of Marin . . . accuses Stephen Mitchell Bingham, . . . John L. Spain [et al.], of a felony, to wit: conspiracy . . . in that (a) Stephen Mitchell Bingham and George Lester Jackson, now deceased, did prior to, and continuing on or about August 21, 1971 . . . conspire . . . together and with other persons whose names are unknown to the Grand Jury to . . . commit felonies, to wit: (1) The escape by force or violence . . . of George Lester Jackson and others . . . [etc. (delence . . . of George Lester Jackson and others . . . [etc. (describing other felonies)]. (b) On or about August 21, 1971, . . . defendant . . . John L. Spain . . . did join the conspiracy of Stephen Mitchell Bingham and George Lester Jackson and other persons . . . and did . . . conspire . . . with Stephen Mitchell Bingham and George Lester Jackson, and among themselves, for the purpose of . . . commit[ing] the felonies above described. . . ."

The evidence that jackson had planned, and with the assistance of a person or persons outside the prison prepared to escape, was clear. There was evidence that Spain was privy to these plans and assisted these preparations. But as to the central fact necessary to be proven, that Jackson and Bingham conspired, the evidence, while sufficient, is less compelling.

The prison authorities were aware long before August 21, by virtue of a letter in Jackson's hand which had fallen into theirs, that he had encouraged others (not including Bingham) to smuggle weapons into the prison and to him and otherwise to assist him to escape. After Jackson's death, another letter in his hand was found in the Adjustment Center; some references in the letter suggest it was written in or about early 1971. The letter reveals that jackson and "the party" were planning an imminent escape and a variety of violent escapades, that some prisoners had "thrown water" on the plans and, most significantly, that Jackson was already stockpiling weapons and had a gun.[2]

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[2]The letter stated: "They know that so it's a question of them facing the pigs guns they think or facing mine. They're trying for a shakedown so that I'll lose mine . . . ."

On August 21, Jackson had two intended visitors, Bingham and a "legal investigator," Vanita Anderson. The latter brought into the prison a small tape recorder. She was frustrated in her attempt to see Jackson but, under circumstances which are ambiguous as to whether there was a prearrangement between them,[3] gave the recorder to Bingham just before his visit. Jackson, his hair, Bingham, Anderson, and her tape recorder were, according to the persons responsible for ensuring that they carried no arms, closely searched before Jackson and Bingham's visit. Nevertheless, Jackson emerged from the visit with a bullet clip in his hair (actually an "Afro" wig) and an automatic pistol underneath it. The prosecution's theory was that Bingham brought Jackson the gun in the tape recorder.

The security arrangements relative to the interview were such that Jackson could have removed an object from the tape recorder without Bingham's active cooperation, but it is difficult to see how that act could have been performed without Bingham's knowledge. That

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[3]The officer in charge of the waiting room, who was aware that Anderson had a tape recorder, asked Bingham if he intended to use it "and he said no, and . . . Vanita Anderson . . . asked him if he wanted to use hers, and he indicated that he did."

knowledge would not be sufficient to make Bingham a party to a conspiracy but it would be sufficient to explain his disappearance upon leaving the prison.

When Jackson returned to the Adjustment Center from the interview, the bullet clip was detected; whereupon, he removed the gun from under his wig and forced one of the four correctional officers, who were present to open the cells of other prisoners, many of whom emerged and some of whom -- including, admittedly, Spain and Pinell, and, as shown by sufficient evidence, Johnson -- played an active role in binding the officers and placing them in cells where they were assaulted. During the turmoil, two other officers were admitted to the Adjustment Center and subjected to similar treatment. An officer accompanying the last to be admitted raised an alarm. Jackson and Spain then fled from the Adjustment Center. Jackson was shot and died instantly. Spain was located in some shrubbery in which he had taken cover. Order was restored in the Adjustment Center. One officer had bled to death from a neck wound; two had been shot to death; three others had their throats cuts but survived; two prisoners died from similar wounds. A number of knives and improvised

knives were found in various locations. No firearms were discovered except Jackson's pistol.

Spain is a black and was in August 1971 a member of the Black Panther Party. Jackson was also a member of the party, and it is reasonably probable that "the party" of which he spoke in the letter which referred to his gun and his plan to escape was the Black Panther Party.

The district attorney argued to the jury that the Black Panther Party had helped to smuggle weapons or ammunition to Jackson and implied that Spain's party membership was evidence that he, too, was "involved in" the escape plan and "working with" Jackson.

Pinell

Hugh A. Pinell, nicknamed "yogi," was found guilty of two counts of assault with a deadly weapon on nonprisoners, namely, correctional officers, Breckenridge and Rubiaco, by a life prisoner. (Pen. Code, § 4500.)

The evidence showed that while Officer Rubiaco was opening cells, Pinell, armed with a small knife forced Officer Breckenridge into a tier and ordered three prisoners to take him to a cell. Jackson and Spain forced Officer Rubiaco to join him. Both officers were bound, and for a certain period of time, placed face down on a

bunk or made to wear a pillowcase so that their vision was interfered with. Rubiaco's neck was cut twice by an unknown person and a third time by Pinell. The last wound was caused not by a knife but by an object like a razor blade embedded in a toothbrush, which was later found in the cell.

Breckenridge saw Rubiaco's throat being cut but could not tell by whom. At the time or shortly before, he could hear Pinell's voice, and said to him: "There is no need for this, Yogi. Don't do it Yogi." A voice which he recognized as Pinell's replied: "You don't know who this is." Within seconds of the infliction of the third wound on Rubiaco, Breckenridge was stabbed twice in the neck. Later, he was stabbed a third time by an unidentified assailant.

Johnson

David Johnson was identified by Officer Breckenridge as one of the three prisoners who was ordered by Pinell to take him to the cell.

Breckenridge testified that Johnson and a codefendant (who was acquitted) bound him. Some time after Breckenridge was stabbed twice, he heard the codefendant say, "These pigs aren't dead yet," and a voice, which he believed was Pinell's, say, "Go in and strangle

them." Johnson applied a ligature to his neck for a few seconds but released it when Breckenridge pretended to expire. For this action, Johnson was found guilty of assault by means of force likely to produce great bodily injury. (Pen. Code, § 4501.)

Although Breckenridge testified that the third stab wound to his neck (which occurred after Johnson strangled him) caused blood to obscure his vision and a state of shock to ensue, there was medical evidence that it was one of the first two wounds. Experts called by the codefendants testified that the consequences of the wound would include an impairment of Breckenridge's perception and mental functioning (and therefore his ability to recognize Johnson). The reliability of Breckenridge's identification of Johnson was also challenged on the grounds of the officer's limited prior association with the prisoner and a suggestive photographic identification process. Johnson and the codefendant offered, but were not allowed, to prove by the testimony of an expert in "eye witness identification," a psychology professor, that the reliability of such identification is adversely affected by such factors as a difference in race between the witness and the person to be identified.

Johnson was not a member of the Black Panther Party.

I. Juror Fagan's Meetings With The Judge

The following facts form the basis of appellants' contention that violation of their constitutional rights at trial by an in camera meeting between the judge and a juror requires reversal of their convictions.

Patricia Fagan had from the age of six or seven been a "good," "close," but not "best" friend of Carolyn Olson. Fagan's and Olson's mothers were "very good" friends. Fagan cared for Olson's daughter on a daily basis while Olson was attending U.C.L.A. in about 1962. At this time, the two women rarely visited socially. Fagan knew Olson's husband.

In 1968, in Santa Monica, Olson was killed and her husband wounded. At the time, Fagan was living in Concord. She learned of Olson's death a couple of weeks later. The circumstances of the killing, as known to her, were that Olson and her husband were playing tennis when two people demanded their money, ordered them to lie down, and shot them. In 1970, Elmer "Geronimo" Pratt was arrested for the murder and as a member of the "L.A. 18," a group of Black Panther Party members wanted in connection with a shoot-out with the Los

Angeles Police. A month or two after Pratt's apprehension, Fagan heard that Olson had been killed by two persons, members of the Black Panther Party, one of them a leader.

Fagan, during the voir dire of the venire, was shown a videotape of the trial judge's admonishing prosecutive jurors of the importance of revealing any association with crimes of violence and attitudes toward radical groups, specifically the Black Panther Party. Fagan was asked:

> "Q. How about crimes of violence? Any knowledge of that at all?
>
> "A. No.
>
> "Q. Witness, victim, otherwise?
>
> "A. No.
>
> ". . . . . .
>
> "Q. Have you heard of the Black Panther Party?
>
> "A. Yes.
>
> "Q. Do you associate the Black Panther Party with any form of violence in your own mind?
>
> "A. No."

During the course of the trial, Spain called as a witness Louis Tackwood who testified to a supposed plot

on the part of various law enforcement officers to encourage an attempt by George Jackson to escape and by a group of Panthers to rescue him, whereupon all would be ambushed by officers. Tackwood named one Pratt as the leader of the purported rescue group and identified him as a police informant.

On cross-examination, Tackwood was impeached by being asked whether he knew that Pratt had been arrested in 1970 for the murder of a Santa Monica woman, had been convicted of the charge in 1972, and had been in custody continuously during the time when he was supposedly involved in the rescue plot.

During the afternoon recess on the day of the above cross-examination, according to Fagan, she "went to the chambers of Judge Broderick and told him a friend of mine had been murdered in Santa Monica by a Black Panther Party member, but that I did not know for certain that the two incidents were the same and that if the matter were gone into further, I might start to cry in the courtroom. The judge indicated that it was unlikely that the two incidents were identical and said something to the effect that I should not concern myself with it. I then left his chambers."

The judge's recollection of the incident was "in substantial agreement with Mrs. Fagan's." He "got the impression that ["if . . . Pratt's killing of her friend was gone into in the evidence of the case"] the emotional drain on her would be very high." He attached "little significance, if any" to her association of Pratt with Olson's murder, and told her so and "that she should simply forget about it." He asked her if it would affect her disposition toward the case, and she said that it would not.

Fagan returned home in the evening and asked her mother, who "was up here watching the proceedings," but had not attended that day, the name of the person who had killed Olson. Her mother informed her that it was Pratt.

The next day, Fagan went to see the judge again and told him that she had confirmed that Pratt was the killer of her friend. She told him that if the subject should come up again, "it would cause me some concern for my emotional composure in the courtroom," i.e., "if the attorneys were going to go into it much more thoroughly or much more deeply . . . I was liable to start crying . . . ." Her recollection was that "the judge said the lawyers probably were not going to go into that

matter further and I said something to the effect, 'O.K., no problem, then'. . . ." The judge recalled that he told her he didn't see how the connection between Pratt and Olson was "significant" but asked Fagan if she felt that "it would have any affect on her disposition towards the case." According to the judge, "She said that . . . she felt that if Mr. Pratt were called to testify, that she would be very unsettled by that."

The judge did not hold a hearing with regard to Fagan's communications, nor inform the parties or their attorneys thereof. His explanation for not doing so was that he didn't see how Fagan's knowledge of Pratt's crime would have any relation to the evidence in the case. He admitted that the implications of Pratt's knowledge as to her attitude toward violence and her response to questions on voir dire designed to elicit expressions of that attitude "didn't dawn on me."

No evidence was introduced that Pratt had killed or had been convicted of killing Olson.

Fagan, however, told other jurors that Pratt had been convicted of murdering a friend. She denied making any derogatory comments about the Black Panther Party in that connection.

The cross-examination of Tackwood about Pratt's murder of a Santa Monica woman and Fagan's first visit to the judge occurred on a Thursday; her second visit on a Friday. On Monday a witness identified Pratt as "the leader of the Panthers in Los Angeles."

Spain subsequently presented evidence of his Black Panther Party membership and called as witnesses leaders of the Black Panther Party, one of whom testified briefly as to her experience as a Panther and another as to her association with Spain.

Fagan's relation to Pratt and her visits with the judge came to light after the trial. Appellants moved for a new trial on related grounds in the course of which Fagan testified. In denying the motion, the court found that the questions put to Fagan on voir dire did not call upon her to express her knowledge of the killing of Olson and of the Black Panther Party's association with it and that, even if they did, she did not wilfully conceal such knowledge. With regard to the juror's communication to the judge, the court ruled that "the event lacked any significance" and "had no evidentiary qualifications" and was handled correctly.

The issue on appeal arises at the confluence of three streams of constitutional doctrine, flowing from the

right of defendants in criminal proceedings to trial by an impartial jury, their right to be personally present during the proceedings, and their right to be represented by an attorney.

For our purposes, we assume, as all appellants contend, that there was a federal constitutional error committed as a consequence of the in camera conversations between Fagan and the trial judge in that neither appellants nor their counsel were present.[4]

However, the matter must be put in context and viewed from the perspective of the entire case.

The incident arose more than eight months into the trial, some three months after the prosecution had rested and the defense had begun the presentation of evidence.

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[4]The dissent seems to say that the trial court by not including counsel during the in-chambers discussion with juror Fagan acted contrary to the requirements of Penal Code section 1120. Let us so assume. But because we agreed that there was constitutional error, obviously a matter of greater moment in terms of the magnitude of the error and the nature of the review as to reversibility, we fail to perceive the relevance of discussing the error in terms of Penal Code section 1120.

Tackwood's testimony, in the course of which Pratt's name surfaced, consumed a few days in a case that took a year of actual trial time.

Pratt figures, at most, tangentially in the case. According to Tackwood, the police and "others" plotted to induce Jackson to escape. Pratt, a police informant and a leader of a Southern California Black Panther group, was to mount a rescue operation from the outside to aid Jackson in his escape. The final scene of this plot would see the police lying in wait, massacre Pratt, his rescue group, and Jackson in the course of the attempted escape. Pratt was not present at the breakout; he was in jail and had been there long before the breakout. Pratt did not appear at the trial. Neither was there any "rescue group" present to aid Jackson in his attempted escape, nor did any member of that alleged group appear at the trial.[5]

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[5]The dissent asserts that juror Fagan's knowledge that Pratt had been convicted of the murder of her friend "filled an 'evidentiary gap' in the prosecution's case." (at p. 11.) Unfortunately, we are not enlightened further as to what the "'evidentiary gap'" was, before it got filled, particularly in view of the fact that the testimony as to Pratt came in as a part of the defense presentation. The dissent thus seems to suggest that unlike our characterization of Pratt as "at most, tangentially," relevant to the case, Pratt and the fact of his conviction were relevant to the case, Pratt and the

As we see it, the error was committed by the trial court in denying appellants and their counsel the right to be present at the conversations between Fagan and the trial judge in order to ascertain whether, as a

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fact of his conviction were important. But, then, we are confounded by the dissent stating that "If Pratt's status was not relevant to the jury's deliberations, in my view, the potential for prejudice or bias looms even greater." (At p. 11.) Again, unfortunately, the dissent explicates no further. We return to the dissent's "'evidentiary gap.'"

It is an understatement to say that Tackwood's testimony, on direct examination, strained the bounds of credulity, but let us assume that the jury would have believed the testimony but for juror Fagan's knowledge of Pratt's conviction and, consequently, disbelieved him because of that knowledge. What "'evidentiary gap'" was closed thereby?

Spain's convictions of murder and conspiracy are based on a conspiracy between Jackson and Bingham. There is no connection between Pratt and Bingham in the record; none is asserted. There is no evidence to suggest that Bingham is an agent provocateur who lured Jackson into the escape attempt. As to the assault convictions, what does the Pratt episode, from an evidentiary standpoint, have to do with the substantive issue of whether Johnson and Pinell committed the assaults of which they were convicted. The short answer is--absolutely nothing. Thus, if there were some "'evidentiary gap' in the prosecution's case," for certain, it was not "filled in" by juror Fagan's knowledge, gained outside the record, of Pratt's conviction.

result of the Pratt murder of Fagan's friend, Fagan would be prejudiced or biased against appellant.[6]

The bias or prejudice might have arisen because Pratt was allegedly a member of the Black Panthers and appellant Spain was a Black Panther. Appellants Johnson and Pinell, while not members of the Black Panthers, were blacks. Appellants, of course, were entitled to 12 impartial persons, not 11, in the determination of their guilt vel non. (People v. Pierce (1979) 24 Cal.3d 199, 208.

The burden, therefore, was upon the People to show, beyond a reasonable doubt, that the error complained of did not contribute to the verdict. (Chapman v. California (1967) 386 U.S. 18), in other

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[6]The dissent tells us that if the defendants and their counsel had been present during the Fagan questioning by the trial court, "she would have been disqualified." (At p. 5.) Further, if cross-examination of Fagan had occurred, our brother White states that he "would expect that she [Fagan] would have been excused by stipulation." (At p. 9.) We envy our colleague's ability to predict that which would have happened, but we suggest it is irrelevant. The issue is whether we reverse because of the error that did happen.

words, that Fagan was not biased or prejudiced.[7] We

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[7]There may well be situations were the failure to accord a defendant the constitutional rights involved here so permeate a trial as to constitute reversible error per se. We do not perceive that to be the case here.

The dissenting opinion cites two cases of this court, People v. Locklar (1978) 84 Cal.App.3d 224 (pp. 12-13) and People v. McNeal (1979) 90 Cal.App.3d 830 (pp. 13-14), implying that we have in this case departed from the views expressed in those cases.

In Locklar, as the dissent points out, for apparently good and sufficient reason, the attorney appearing for the defendant refused to participate in any way in the selection of the jury; nevertheless, the trial judge proceeded to impanel the jury. We held that to be reversible error per se. We perceived a substantial difference between what occurred in Locklar and what occurred here. Apparently, the dissent does not.

In McNeal, while the jury was deliberating, it came to the attention of the trial court that a juror had personal knowledge as to some aspect of the case which had a "bearing on the way she will vote." (90 Cal.App.3d at p. 835.)

Unlike the case at bar, the trial judge in McNeal advised counsel thereof. The judge discussed the matter with counsel and stated that he would not go into the facts. The juror was brought into chambers and counsel were present. The judge told the juror that "we don't want to go into factual matters" (id., at p. 836) and asked several times whether she could be fair

and impartial. Ultimately, she said "yes." The prosecutor suggested that the juror had evidence outside the record. The judge then asked the juror, "'Do you feel you could set that aside and judge the case on the evidence?'" (Id., at p. 836.) The juror answered that she could.

The error in McNeal was not the absence of counsel but the failure to find out what "facts" the juror had knowledge of that were not in the record. Because of that failure, we did not know, nor could it be known, from the record whether the juror had knowledge of facts aliunde the record of a prejudicial nature. Under these circumstances, we held that it could not be said that the error was harmless beyond a reasonable doubt.

The dissent overlooks the crucial distinction, in this aspect, between McNeal and the case at bench, namely, that in McNeal the record did not disclose, whereas here the record does disclose, the outside information of the juror. The dissent states we paid "'lip service' to Chapman error" (at p. 14) in McNeal because we found "no occasion to examine and weigh the evidence in terms of "'harmless error'" (at p. 14). It would seem anomalous for a justice to characterize his own opinion (White, P.J. concurred in McNeal) as giving "'lip service'" to a legal principle. More important, the dissent fails to understand that since the question in McNeal was juror bias based on knowledge of matters outside the record, it did not matter what the weight of the inculpatory evidence in the record was and, hence, there was no point in examining it. If it could not be shown beyond a reasonable doubt that the juror was not so biased, then the judgment had to be reversed. As we pointed out in McNeal and as we have noted above,

believe that burden has been met. We reason as follows:

At the voir dire, Fagan testified that she did not associate the Black Panther Party with "any form of violence." During her conversation with the trial judge regarding Pratt, the court asked her if the Pratt killing of her friend would affect her disposition toward the case and she replied that it would not. Finally, at the motion for a new trial where all appellants and their counsel were present, she testified that she associated the Black Panther Party with "worthwhile activities" such as a

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it could not be shown for we did not know, nor could we know, in McNeal, because of the trial judge's actions, what that knowledge was that precipitated the problem.

People v. Sarazzawski (1945) 27 Cal.2d 7, cited in the dissent (pp. 5-6), supports our position. There, the trial judge in impanelling a jury, told them, in effect, that if they became the jury and during the trial remembered something they had forgotten during their voir dire examination or realized that some of their answers thereon had been erroneous, "'it is your secret. Don't say anything more about it.'" (Id., at p. 18.) The court held that the judge's admonition was reversible error per se, because, by the very nature of the admonition, "any disqualification discovered or remembered by a juror . . . would have to remain forever undisclosed once the jury were sworn." (Id., emphasis added.)

breakfast program for school children carried on by the party.

It is true, of course, that Fagan's testimony at the motion for a new trial came several months after the verdict. Obviously, it would have been much better if appellants and their counsel had had the opportunity to examine her at the time when the Pratt matter was uppermost in her mind. Nevertheless, we do not see, nor did the trial court see, any reason to disbelieve her testimony.

But we rely not only on Fagan's testimony at the voir dire, her statements to the judge in chambers, and her testimony at the motion for a new trial (some of that testimony insofar as it relates to her mental attitude in arriving at the verdicts may well have been inadmissible (Evid. Code, § 1150, subd. (a); see People v. Pierce, supra, 24 Cal.3d at pp. 207-208; People v. Hutchinson (1969) 71 Cal.2d 342) and we disregard it.)

In addition, we rely on the objective results of the jury deliberations as demonstrating that the jury, as a whole, and Fagan, in particular, were unbiased.

The jury deliberated 24 days before coming down with its verdicts. Appellants suggest that such an unusual length of time for jury deliberations indicates how

closely the case was balanced. On the contrary, it suggests to us that the jury carefully considered and evaluated the evidence, rather than by reason of bias or prejudice, engaged in a rush to verdict. It must be remembered that there were 6 defendants, 12 counts, and some 45 verdicts to be reached. The prosecution began its opening statement July 28, 1975, and the case went to the jury on July 15, 1976.

Significantly, the jury acquitted three defendants completely, involving a total of 21 charges. Appellant Spain charged with 5 counts of murder, 1 count of conspiracy, and 1 assault count was found guilty of two counts of murder, and the conspiracy count, but was acquitted of the other 4 counts. Appellant Pinell was acquitted of all murder and conspiracy charges, and one assault charge, but was convicted of two other counts of assault. Appellant Johnson was acquitted of all murder and conspiracy charges, and one assault charge, but was convicted of another assault charge.

To recapitulate, of 6 defendants facing 45 verdicts of guilty, 3 defendants were convicted of a total of 6 charges.

We emphasize that Spain, who was a Black Panther, was acquitted of three counts of murder and one count of assault.

In the light of the nature of the error, the marginal relevance of Pratt to the issues of the case, Fagan's disclaimers as to any effect that Pratt's murder of her friend might have on her consideration of the case, and the jury verdicts ultimately reached, we are convinced beyond a reasonable doubt that the jury as a whole, and Fagan, specifically, were not biased or prejudiced.[8]

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[8]The dissent, in the course of its learned disquisition about the fundamentals of due process, quotes from Glasser v. United States (1942) 315 U.S. 60, 76 (at p. 15) to the effect that where a defendant has been denied assistance of counsel, courts should not "indulge in nice calculations as to the amount of prejudice arising from its denial." (Emphasis added.)

First, the dissent overlooks the factual matrix from which the Glasser opinion springs. In Glasser, Glasser and a codefendant were to go to trial on a charge of criminal conspiracy. They were represented by separate counsel. Before trial, the codefendant discharged his counsel. The trial court appointed one of Glasser's attorneys to also represent the codefendant, without Glasser consenting to such dual representation, even though the judge was apprized that it was possible that the interests of Glasser and the codefendant were inconsistent. Thereafter, the attorney represented both Glasser and the codefendant throughout the trial. The

II. Shackling of Appellants

Appellants were shackled throughout the trial proceedings. They contend that their convictions should be reversed because the court failed to comply with the requirements of People v. Duran (1976) 16 Cal.3d 282, in not making a "due process determination" that "manifest necessity" existed for the use of shackles, in relying on

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court reversed Glasser's conviction, stating "Our examination of the record leads to the conclusion that Stewart's (the attorney involved) representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment." (315 U.S. at p. 76.) Thus, what the high court held was that where prejudice was shown on the record, the court would not engage in "nice calculations" as to how much prejudice resulted from the error. Glasser, in fact, suggests that Sixth Amendment error (a part of due process under the Fourteenth Amendment) may, under some circumstances, not be ground for reversal. (Id., at p. 67.)

Finally, in this context, the dissent seems to misread our opinion by implying that we have engaged in those "nice calculations" of which Glasser speaks. We concluded that appellants were not prejudiced at all by the failure of the trial judge to bring in defense counsel in the course of the juror Fagan incident because, in our view, the record shows, as we have said, that, beyond a reasonable doubt, she was not prejudiced.

impermissible considerations in deciding to maintain the shackles, and in not making a record as to why appellants were shackled.

The requirement of a "due process determination" of the necessity for shackles attached as of the decision in People v. Duran, supra, that is, after the trial had been in progress for approximately one year (since the beginning of jury selection) and while six more months remained (until the verdicts were returned). But even if we assume that there was error in the shackling of appellants throughout the trial, was the error prejudicial? We believe not. Not only were appellants shackled but the three acquitted defendants were also shackled. Further, the three appellants, as we have noted earlier, were in fact acquitted of most of the charges against them. Under these circumstances, it is obvious that the shackling had no effect upon the jury's verdicts.

III. Pinell's Opening Statement

Appellant Pinell, who was representing himself, made an opening statement in which he hypothesized that Attorney Bingham had brought a gun into the prison and intimated that he might be able to say certain things which would be prejudicial to his codefendants, giving rise to a conflict of interest with them. Spain and Johnson

moved for a mistrial and severance. Their contentions on appeal are (a) that they were entitled to severance under the corollary to Faretta v. California (1975) 422 U.S. 806, that where a codefendant's right to a fair trial is jeopardized by a defendant's exercise of his right of self-representation, the state's interest in a joint trial must give way (Thomas v. Superior Court (1976) 54 Cal.App.3d 1054), and they were prejudiced by such denial, and (b) that Pinell's statement posed an Aranda-Bruton problem (People v. Aranda (1965) 63 Cal.2d 518; Bruton v. United States (1968) 391 U.S. 123) which was not solved by Pinell's taking the witness stand.

(a) As shown above, Spain's liability turned on Bingham's conspiring with Jackson; Johnson's did not. It is, therefore, impossible to see how Johnson could have been prejudiced by Pinell's statement about Bingham. The suggestion that Bingham brought a gun into the prison was contrary to Spain's interest. But Pinell did not assert that Bingham had done so; he merely discussed that possibility and said that he would have to prove it. He did not say that Jackson and Bingham conspired, but rather a contrary proposition, that Jackson was unaware of Bingham's action, which was for the purpose of "setting him up." The slight effect which Pinell's statement might

have had was or could have been dispelled on cross-examination, as will be seen.

(b) Pinell's statement was not evidence, and it is questionable whether the Aranda-Bruton rule applies at all. The statement was like any statement of counsel which the jury was instructed was not evidence and not to treat it as such. At the same time, however, a statement made in the presence of the jury, sworn or unsworn, whether by a defendant or an attorney (see People v. Davis (1957) 48 Cal.2d 241), purporting to be based on personal knowledge and tending to inculpate the defendant, would not be easy for the jury to disregard, and the remedial measures and standards of reversibility prescribed by Aranda and Bruton should be applied.

So far as the Aranda aspect of the rule is concerned, the question is whether a defendant's statement "substantially inculpated or incriminated" a codefendant. (People v. Epps (1973) 34 Cal.App.3d 146, 158.) Because it is not reasonably probable that it did, it was harmless. (See People v. Atkins (1975) 53 Cal.App.3d 348, 356-357.)

As to the Bruton aspect of the rule, the statement did not infringe Pinell's codefendants' constitutional rights because he took the stand and was

subject to cross-examination. (Nelson v. O'Neill (1971) 402 U.S. 622, 629-630; In re Rosoto (1974) 10 Cal.3d 939, 951-952.)

IV. Admission of the Jackson Letter

Spain contends that the letter, partially in the hand of George Jackson, which had been in the possession of the authorities for many months before August 1971, and showed his plans to smuggle arms into the prison and to attempt to escape, should have been excluded as hearsay and under Evidence Code section 352. Spain also argues that the letter should have been excluded under the principles of Aranda and Bruton. Respondent counters that the letter fell within the exception to the hearsay rule for declarations against penal interest, that it was probative of Jackson's intent to escape (an element of the conspiracy charge) and not prejudicial as to Spain because it did not inculpate him or his and Jackson's party, and that the Aranda-Bruton rule does not apply to a statement which does not implicate anyone other than the person who makes it.

The short answer as to whether the letter was inadmissible hearsay is that it was admissible as an exception to the hearsay rule as showing Jackson's state of

mind, i.e., his intent to escape (Evid. Code, § 1250, subd. (a)) which was relevant to the conspiracy charge.

The letter did not implicate Spain in Jackson's plans, or show the existence of a conspiracy between Jackson and Bingham, which was prerequisite to Spain's guilt, or implicate the Black Panther Party.

For all these reasons, the admission of the letter did not offend the Aranda-Bruton rule, and its probative value was not outweighed by its prejudicial effect.

V. Delay of Trial

In September 1973, Spain made a motion, denied in November, to dismiss the indictment on the ground that he had been denied his right to a speedy trial. In January 1974, the indictment was quashed (on a motion in which Spain joined), and the People appealed. In February, Spain made a demand under Penal Code section 1381 to be brought to trial--i.e., that the People proceed against him by complaint, preliminary examination, and information. The demand was not honored. About a year later, the order quashing the indictment was reversed and the case remanded for trial. Upon remand, he moved to dismiss the indictment on statutory and constitutional grounds. The motion was denied.

Spain contends that the refusal of the prosecution during the time between the order quashing the indictment and the appellate decision reversing the order to bring him to trial denied him (a) his statutory right under Penal Code section 1381, to be brought to trial within 90 days, and (b) his due process right, not to be subject to unreasonable pretrial delay, and that he was prejudiced by being tried in chains and, in the context of Pinell's unsworn statements, which would not have occurred if he had not been tried together with Pinell, and also by the conditions of pretrial confinement which he endured for an extra year.

Although Spain urges that the reasons for applying Penal Code section 1381 obtained because there was no doubt that the People intended to prosecute him, the code section, by its terms, applies only to "pending" complaints, informations, or indictments and there were no such proceedings pending when he filed his demand for trial within 90 days. This statutory right, therefore, was not violated, nor was his constitutional right to a speedy trial. As to his other contentions in this regard, we find them to be without merit.

VI. Erroneous Exclusion of Testimony of Expert in Eyewitness Identification

Appellant Johnson contends that the court erroneously failed to conduct an evidentiary hearing on his motion to exclude in-court identification evidence on the ground of a suggestive out-of-court identification process. It appears, however, that Johnson did not request a hearing except as to a matter which was not in dispute and that the motion was submitted. The court ruled on the basis of assumed facts favorable to Johnson's position.

Weighing the "corrupting effect of the suggestive identification" (Manson v. Brathwaite (1977) 432 U.S. 98, 114) against the factors indicating its reliability (Neil v. Biggers (1972) 409 U.S. 188, 199-200), and including the factor of the witness' previous familiarity with Johnson (see Manson v. Brathwaite, supra, at p. 133, fn. 14 (dis. opn.)), limited though it may have been, we cannot find that the trial court's implicit determination that the identification was reliable was clearly erroneous. (Neil v. Biggers, supra, at p. 200.)

For the same reasons (see Manson v. Brathwaite, supra, at p. 106, fn. 9), we must uphold the admission of evidence of the out-of-court identification

process and its results. It appears further that given the admission of the in-court identification, Johnson was not aggrieved by the evidence of the out-of-court identification because its suggestiveness tended to vitiate the in-court identification.

Johnson also complains of a remark by the trial court in the hearing of the jury that the witness had identified him. It appears that the court was merely indicating that the witness had named or pointed out appellant and not some other Johnson and was not expressing an opinion that the identification was accurate. Any such implication was dispelled by a cautionary instruction.

Finally, Johnson urges that it was error to exclude the testimony of an expert in "the angaries of eyewitness identification." (United States v. Wade (1967) 388 U.S. 218, 228.) The court below relied--and the People now rely--on People v. Johnson (1974) 38 Cal.App.3d 1, as authority for exclusion of the evidence.

There, the trial court rejected "an offer of the expert testimony of a doctor of psychology dealing with the ability of witnesses accurately to perceive, recall and relate and with the distorting effects of excitement and fear on perception and recollection." (Id., at p. 6.) The

appellate court sustained the ruling as one well within the range of discretion. (Accord People v. Guzman (1975) 47 Cal.App.3d 380; People v. Brooks (1975) 51 Cal.App.3d 602.) We see no reason to depart from the rule of these cases and, therefore, we reject appellant's contention.

VII. Instruction Regarding Penal Code Section 4501

Appellant Johnson was convicted of count VIII of the indictment, which charged that he, a person confined in a state prison for a term less than life, assaulted a nonprisoner, Officer Breckenridge, by means of force likely to produce great bodily injury in violation of Penal Code section 4501.

The indictment was read to the jury, but it was not provided with a copy of the document, even when it requested one. The jury was provided with all the instructions in writing.

Penal Code section 4501 applies also to assault with a deadly weapon. Included in the jury instructions was an instruction which quoted Penal Code section 4501, including both the "by means of force likely to produce great bodily injury" and the "with a deadly weapon" language. Another instruction defined the elements of a violation of section 4501 for the purposes of count VIII as

including the use of force likely to produce great bodily injury but not the use of a deadly weapon.

Other instructions defined assault with a deadly weapon for the purpose of other counts.

It is contended by Johnson that some of the jurors may have doubted that he had applied the strip of cloth to Breckenridge's neck long enough for it to constitute an assault by means of force likely to produce great bodily injury but believed that the cloth was used as a deadly weapon and therefore voted to find him guilty of violating section 4501 because that section included assaults with a deadly weapon.

Appellant's contention that he was prejudiced by the misleading nature of the instruction is not compelling.

To reach the conclusion that Johnson was guilty of violating Penal Code section 4501 by assaulting Breckenridge with a deadly weapon, a juror would have to decide that a strip of cloth, which, of course, is not an "inherently deadly" weapon (People v. Russell (1943) 59 Cal.App.2d 660, 665), was used in such a manner as to be a deadly weapon. The jury was instructed that "A deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing and likely

to produce death or great bodily injury." It would be unreasonable for a juror to believe that the strip of cloth was a deadly weapon because "likely to produce great bodily injury" and that Johnson assaulted Breckenridge with such an object but that he did not assault him with force "likely to produce great bodily injury." If appellant did not use force likely to produce great bodily injury, then the cloth was not used in a manner likely to produce great bodily injury and therefore was not a deadly weapon.

VIII. Challenges to Judges

A judge who presided as an early stage of pretrial proceedings was challenged for cause pursuant to Code of Civil Procedure section 170, subdivision 5. It was disallowed. Then at a time when Pinell was arguably unrepresented, the judge determined the question of the number of "sides" to the defense for the purpose of fixing the number of challenges available under Code of Civil Procedure section 170.6, ruling that there was but one for all the defendants. Spain then unilaterally exercised the defendants' one challenge as to this judge. Pinell eventually sought to challenge the trial judge under section 170.6, arguing that the question of sides was erroneously determined and that he was not bound by the

previous determination, but his challenge was ordered stricken on the ground that the defendants had already exercised the challenge.

Pinell contends that the procedure whereby the earlier judge denied the challenge for cause was erroneous. The issue might seem moot, since this judge did not preside at trial, but Pinell argues ingeniously that, if proper procedures had been followed, then this judge might have been disqualified (and we cannot assume the contrary), and thus Spain would not have used the defense's one peremptory challenge, and it would have been available to him to employ against the trial judge. The flaw in this argument is that it assumes that the challenge would not have been exercised by some other defendant against another judge who presided after the earlier and before the last. A contrary assumption is reasonable.

The question of sides was subject to redetermination when the matter of Pinell's representation was settled and, in any case, when discovery was granted of the statement of a potential witness which arguably created an adversity of interests between the defendants as to whether the witness should be treated as friendly or

unfriendly.[5] Assuming it was error to refuse to redetermine that question (cf. Welch v. Superior Court (1974) 41 Cal.App.3d 50, 53), it would not be prejudicial error unless it were reasonably probable that a determination of adversity of interests would have been made. If, as it happens, a determination had been made on the basis of the potential testimony of the witness that an adversity existed, it would have been between Pinell, Spain and Codefendant Drumgo, on one side, and other defendants, on the other side or sides. The determination thus would not have resulted in the availability of an additional challenge to Pinell because Spain had already exercised his side's challenge.

The question remains whether it was error to permit Spain unilaterally to exercise the challenge available to all of the defendants (or to all the defendants on his "side"). Put otherwise, the question is whether Pinell had any remedy, such as another challenge, when Spain, without his concurrence, "used up" the only challenge available to him.

Johnson v. Superior Court (1958) 50 Cal.2d 693, 700, considered this problem:

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[5]Other, but not substantial, allegations of adversity of interests are made.

"It is argued that, while a party who is the sole plaintiff or defendant may always disqualify one judge by complying with the statute, a party who is one of several plaintiffs or defendants is placed in a less favorable position. However, this is true only to a limited extent. Initially, a party who is joined with others cannot be in a worse position than a single party, since he has an equal opportunity to disqualify the judge assigned to hear the case. Such a party cannot possibly be placed at a disadvantage unless one of his coparties has already disqualified a judge in the same action, and then only if his interests are substantially the same as the interests of the one who exercised the challenge. The Legislature could reasonably determine that this limited restriction was justified in order to prevent the undue delays which could otherwise occur, and we hold that section 170.6 does not arbitrarily discriminate against multiple parties."

Thus, Pinell's complaint has been rejected by the Supreme Court.

A contention that the "one challenge per side" limitation of section 170.6 violates equal protection was rejected in Welch v. Superior Court, supra, 41 Cal.App.3d 50, 53, which followed Johnson, adding with reference to Pappa v. Superior Court (1960) 54 Cal.2d 350, that the party left without a challenge can always resort to a challenge for cause.

IX. Sufficiency of the Evidence Against Pinell

The evidence was very strong that a person who said, "I love you, pigs" to correctional officer Rubiaco, also slashed his throat. Rubiaco's identification of Pinell,

by voice, as that person was not unequivocal, uncontradicted, or free of suggestive influences, but its reliability was for the jury to determine, and a reasonable jury, having an opportunity to hear Pinell's voice and note its distinctiveness, could have concluded that he was the assailant. (Jackson v. Virginia (1979) 443 U.S. 307, 318-319; People v. Bassett (1968) 69 Cal.2d 122, 138.)

The evidence that Officer Breckenridge, upon observing the cutting of Rubiaco's throat by a person whom he could not see, said, "Don't do it, Yogi," to which a voice which he recognized as Pinell's, replied, "You don't know who this is," and that within seconds an unseen person or persons stabbed him three times in the throat, is sufficient to support Pinell's conviction of personally assaulting him. But, even if it were not, a reasonable jury might have believed that Pinell ordered other inmates to take Breckenridge to the cell for the purpose of his being assaulted there. Thus, there was sufficient evidence of his guilt as an aider and abettor.

CONCLUSION

This was a lengthy and difficult trial. In our view, appellants received a fair trial; they were entitled to no less, but they were entitled to no more. There has been no miscarriage of justice.

The judgements as to all appellants are affirmed.

Feinberg, J.

I concur:

Scott, J.

I respectfully dissent.

The majority conclude that appellants received a fair trial. I am compelled to disagree.

Simply stated, a felony criminal trial is a process whereby the enforcement power of government is employed to deprive an individual of the fundamental interest of liberty derived from the common law. (See generally, Tribe, American Constitutional Law (1978) pp. 13-18, 506-514.) And procedural due process requirements are implicated whenever this awesome enforcement power of government is employed.

"'The history of American freedom is, in no small measure, the history of procedure,' and 'in the development of our liberty insistence upon procedural regularity has been a large factor.' Procedural safeguards thus 'protect the citizen in his private right and guard him against arbitrary action of government.' It does not matter what the merits involve, or what they show; regardless of innocence or guilt, any person is entitled to at least the fundamentals of a fair procedure. Thus, as the New York Court of Appeals phrased it, it has 'refused "to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the

record to persuade us of defendant's guilt.'"' (Forkosch, Constitutional Law (1969) p. 449.)

'The element of due process analysis characterized as 'procedural due process' delineates the constitutional limits on judicial, executive, and administrative enforcement of the legislative dictates. This has traditionally involved the elaboration of procedural safeguards designed to accord to the individual 'the right to be heard before being condemned to suffer grievous loss of any kind' as a result of governmental choices -- which can take the form of acts or, less commonly, of omissions." (See Tribe, American Constitutional Law, supra, p. 502.)

For me, the disturbing reality is that we are herein concerned with the constitutional implications and consequences of an instance of judicial "omission" to enforce "legislative dictates, "i.e., Penal Code section 1022.[1] We apparently agree, indeed we must agree, that

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[1]Respondent's brief argues that section 1022 is inapplicable but concedes that Penal Code sections 1089 and 1123 are applicable. I disagree because Pratt's custody status was made a fact in controversy by an otherwise impermissible question unless the prosecution intended to introduce evidence to prove that Pratt was in continuous custody and therefore could not participate in a government instigated plot to free

the immediate consequences to appellants are that they were effectively denied their right to be present and their right to the effective assistance of counsel in exercising their right to confront and examine the juror Fagan during the court's determination that "good cause" did not exist for Fagan's discharge as a juror.

Apparently, to the majority, the constitutional implications of the admittedly federal constitutional error is simply to invoke Chapman (Chapman v. California (1967) 386 U.S. 18,*/ standard of harmless error beyond a reasonable doubt on appellate review.) I cannot agree

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Jackson. I also reject respondent's argument that section 1022 is inapplicable because Fagan had no "personal knowledge" of Pratt's status.

In my view a common sense view would include as "personal knowledge" hearsay evidence of a fact from a reliable, trustworthy source; in this instance Fagan's mother. Certainly Fagan was convinced in her mind that Pratt murdered her friend Olson and was convicted and put in prison. In any case, all three code sections require a hearing on the juror's fitness to serve in accordance with minimal standards of due process, which, in my view, require the presence of the appellants and their counsel. Respondents argue that the subsequent motion for new trial satisfies the "hearing" requirement. The argument is absurd.

*. See majority opinion, page 15.

and therefore dissent. In my view the majority's "three streams of constitutional doctrine" at the point they conflow form the wellspring "due process." And when I put the matter at hand in context and view it, I perceive the law to be that a perspective of the entire case**/ is impermissible under the presented circumstances.

As the majority recognize in footnote 7, page 15, in Chapman, supra, at page 23, the Supreme Court indicated "that there some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and in footnote 8, page 23, listed as cases in point "Payne v. Arkansas, 356 U.S. 560 (coerced confession); Gideon v. Wainwright, 372 U.S. 335 (right to counsel); Tumey v. Ohio, 273 U.S. 510 (impartial judge)." See also Glasser v. United States (1942) 315 U.S. 60, 76, where the Supreme Court held the right to assistance of counsel "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

The Fourteenth Amendment to the United States Constitution provides inter alia "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." On this record, my conviction is

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**. See majority opinion, page 13.

that appellants were denied the procedural safeguards of due process of law requiring automatic reversal of their convictions and a new trial.

Thus, it is the very "nature of the error"*/ that prompts the observation that in the ultimate analysis appellants present for our consideration the identical question addressed in Turner v. Louisiana (1965) 379 U.S. 466, i.e., the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the "State has purported to accord." (At p. 471.)

Whatever else it is, a modern jury trial is in reality two trials, one in "front" of the jury and one without its presence. Undeniably, both are "critical" stages of the proceedings. The majority reason that "[o]bviously, it would have been much better if appellants and their counsel had had the opportunity to examine [Fagan] at the time when the Pratt matter was uppermost in her mind."**/ Not only would it have been "better," it would have been fairer. It was obviously not fair to deprive appellants and their counsel their constitutional and statutory rights to notice juror Fagan's possible

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*. See majority opinion, page 18.

**. See majority opinion, page 17.

disqualification and their right to at least make a reviewable record to show cause why she should have been disqualified. (The probabilities are that she would have been disqualified -- certainly on the second day because she did not "forget" as admonished but discussed one aspect of the case with her mother and in so doing received evidence not developed at trial.)

Analytically, Penal Code section 1120 is a model of procedural due process. Without it, every jury trial in our state would be constitutionally infirm. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." (See Irvin v. Dowd (1961) 366 U.S. 717, 722.) "In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworn.' Co. Litt. 155b." (Irvin v. Dowd, supra, at p. 722.)

It is basic that the jury's indifference must endure the entire proceedings to satisfy the necessary attributes of a fair trial and due process. Penal Code section 1120 codifies a procedure whereby the indifference of the jury may be reasonably secured. I reassert, without section 1120 our jury trials are rendered constitutionally suspect. People v. Sarazzawski (1945) 27 Cal.2d 7, holds as much. In Sarazzawski, during voir dire,

the trial judge, in effect, instructed the jury that they were to keep as "'secret'" and not to say "'anything more about it'" to the court as to anything they forgot to reveal in their "'honest'" answers to voir dire questions. (At p. 18.) The Supreme Court held that such an instruction was error requiring automatic reversal of a murder conviction with the imposition of the death penalty because the instruction potentially exacted of the jurors conduct in direct violation of the provisions of Penal Code section 1120. (Sarazzawski, supra, at p. 19.) The opinion concludes and I find it appropriate to the case at bench: "The defendant has not shown that any juror, subsequent to being sworn, discovered that he was subject to disqualification or that he possessed personal knowledge concerning a fact in controversy, but we are of the view that such a showing is unnecessary. It should not be required because the very substance and nature of the error would normally operate to preclude the possibility of such a showing. Every juror who found that he possessed such disqualification or personal knowledge would be bound by the instruction not to reveal it. The defendant thus would be foreclosed from gaining the essential information from what in many cases might be its only repository. Section 4-1/2 of article VI does not

contemplate a situation where defendant 'without fault has been denied an opportunity to determine whether or not he has been prejudicially injured.' (Opinion of this court denying hearing in People v. Stevenson, 103 Cal.App. 82, 93 . . . .) We are satisfied that the instruction must be regarded as error prejudicial per se, so fraught with dangerous potentialities as not to be reconcilable with our concept of the necessary attributes of a fair trial and due process, including the rights to be confronted by the witnesses and to have the protection afforded by the provisions of the statute quoted. (Pen. Code, § 1120.) [¶] For the reasons above stated the judgment and order appealed from are reversed and the cause is remanded for a new trial." (At p. 19; emphasis added.) (Section 4-1/2 of article VI is now article VI, section 13 of the California Constitution.)

Obviously, all of the "dangerous potentialities" feared by the Sarazzawski court were realized in the case we review. We should not hesitate to automatically reverse these blatant denials of due process.

Implicitly the majority's view is that the "protection" afforded by the provisions of Penal Code section 1120 need not be strictly adhered to; perforce, they find what happened here "fair"; I do not. Fairness in

our adversary system requires that both the prosecution and the defendant get their full day in court. Frankly, it is not procedural fairness for any party to be advocating his or her case to the triers of the facts on the assumption that they are fair and impartial when, in fact, the trial judge is aware that one of their number's impartiality is at least suspect. A "fair" hearing was required to remove that cloud of suspicion if the constitutional right to an impartial jury was to remain secure for all parties to the lawsuit. Whatever procedure or "process government grants is, by definition, the process that is 'due.'" (See Tribe, American Constitutional Law, supra, p. 505.)

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." (Anti-Fascist Committee v. McGrath (1951) 341 U.S. 123, 179 (conc. opn. of Douglas, J.).)

Penal Code section 1022 affords the parties a fair hearing; the procedure followed herein denied appellants a fair hearing on the issue of Fagan's

impartiality. The trial judge's question of Fagan eliciting a response that Pratt's killing of her friend would not affect her disposition toward the case does not meet the standard of fundamental fairness embodied in the concept of "due process." Commendably, the court was solicitous of the juror's state of discomfiture (she said she might break down and cry if she saw Pratt face to face); thus he sought to and did reassure her, telling her not to be concerned about the Pratt incident.

But the role and duty of the court is to protect the rights of the accused. Certainly the accused is entitled to the assistance of counsel. (See Glasser v. United States, supra, 315 U.S. 60, 71.) There is no adequate substitute for the presence of the defendants and their counsel at every stage of a trial. As this case clearly illustrates, cross-examination under oath of juror Fagan would most assuredly have probed her state of mind and disposition to depths of which even she was not fully aware. (I would expect that she would have been excused by stipulation.) Essentially, I believe that it is for this consideration that I perceive the law to be that "[t]he likelihood of prejudice, not its actuality, is inherent where desired counsel is lacking at any critical stage, and this alone requires a reversal of a conviction without a

showing of actual prejudice." (Forkosch, Constitutional Law, supra, pp. 449, 502; see also White v. Maryland (1963) 373 U.S. 59.) Appellants were not entitled to 12 jurors who associated the Black Panthers with breakfast programs, but "due process" required that they be afforded full opportunity to seat 12 jurors who did not associate, from either personal experience or that of friends, Black Panthers with acts and crimes of violence. They were effectively denied this opportunity. The trial court's failure to afford this opportunity in a section 1022 hearing violated even minimal standards of due process. (See In re Oliver (1948) 333 U.S. 257; Tumey v. Ohio (1927) 273 U.S. 510.)

The basic requirement of due process is afforded all regardless of the heinousness of the crimes charged, the apparentness of their guilt or their stations in life. In more eloquent fashion, it was written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416. (See Irvin v. Dowd, supra, 366 U.S. 717, 722.)

In Turner v. Louisiana, supra, 379 U.S. 466, 472-473, I find Justice Stewart's thoughts appropriate; they compel the result I reach: "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is

embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality--an appendage--of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law." Sinclair v. United States, 179 U.S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.' Frank v. Magnum, 237 U.S. 309, at 349 (dissenting opinion).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury." (Emphasis added.)

Fagan received evidence in this case on an issue of fact that was not developed on the witness stand. The prosecution did not simply ask Tackwood whether he knew Pratt was in custody in laying a foundation to prove that Pratt could not have been enticed by the government

to participate in Jackson's escape from San Quentin. The fact that Pratt was in custody for the murder of a Santa Monica woman need never have surfaced if taken care of by appropriate stipulation of the parties. Presumably there would then be no occasion to labor on this dissent. But it is clear that the form of the question did strike a responsive chord in at least juror Fagan's mind. Tackwood's answer did not actually impeach his testimony because he answered "no," meaning he did not know whether Pratt was or was not in custody after trial for the murder of a Santa Monica woman. It appears that the prosecution never proved these facts. However, juror Fagan not only verified the facts by asking her mother, she informed some of her fellow jurors. The record does not reveal when she discussed the matter with her fellow jurors. The immutable fact is that evidence was received by some members of the jury from a source other than the witness stand. It is no answer to conclude that Pratt's involvement was at most tangential because the relevant fact is that Fagan's hearsay evidence filled an "evidentiary gap" in the prosecution's case. If Pratt's status was not relevant to the jury's deliberations, in my view, the potential for prejudice or bias looms even greater.

In Turner v. Louisiana, supra, 379 U.S. 466, the Supreme Court struck down Louisiana's approved practice of allowing two deputy sheriffs' "key" witnesses to also be in charge of the trial jury. The condemned appellant was unable to show any prejudice, but at page 473, the Supreme Court ruled that a showing of prejudice was not required because the "potentialities" outside the trial may have made the courtroom proceedings little more than a "hollow formality." I detect Turner's "potentialities" lurking in this case.

In People v. Locklar (1978) 84 Cal.App.3d 224, 228 (Feinberg, J.), this court recognized the holding in Gideon v. Wainwright (1963) 372 U.S. 355, 342, that "[t]he Sixth Amendment's guarantee of counsel is a fundamental right and is essential to a fair trial." Further we quoted with approval Argersinger v. Hamlin (1972) 407 U.S. 25, 37, that "'[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at this trial.'" In Locklar, a public defender not assigned or familiar with the defendant's case, who appeared to obtain a short continuance occasioned by the sudden illness of assigned counsel, was required by the trial court to "represent" the

defendant during jury selection. Locklar did not consent and counsel, true to his announced intentions, refused to question prospective jurors and exercised no challenges. After trial and conviction we required no showing of prejudice in reversing the judgment. Although we sympathized with the trial court's problem, we reasoned that in denying the defense a continuance under the circumstances, the trial court's actions denied the defendant the effective assistance of counsel. We held the abuse of discretion error that was reversible per se. We also held that under all the circumstances, including counsel's inaction, the defendant was deprived of a fair jury. Thus, we recognized that because the right to exercise peremptory challenges is an essential apart of a trial by jury, a defendant is therefore entitled to the assistance of counsel during jury impanelment. (Id., at p. 229.) There is no apparent reason for not applying the same reasoning and principles to the case a bench wherein the trial court's omission effectively denied appellants effective assistance of counsel. Clearly, the right to show cause that a trial juror is unqualified to perform his or her duties is no less an essential part of trial by jury than the right to exercise peremptory challenges. Both "rights" function to assure the parties

that the case will be decided upon the evidence adduced in court and not otherwise. (See Swain v. Alabama (1965) 380 U.S. 202, 219.)

In People v. McNeal (1979) 90 Cal.App.3d 830 (Scott, J.), we decided an appeal wherein it appeared that after the jury began deliberations the trial court was alerted that one of the jurors possibly had some personal knowledge of the case, brought about by the testimony of a defense witness, which would have a bearing on the way she would vote. The record would not support a finding of jury misconduct. Therefore, we did not base our decision reversing the judgment upon a presumption of prejudice. We evaluated the error in the light of a defendant's right to a jury trial by a fair and impartial jury as provided by the California Constitution, article I, section 16. At page 840, we concluded: "It is evident that a purpose of Penal Code sections 1089, 1120, and 1123 is to provide a vehicle for the dismissal of a sworn juror when facts are discovered from which it can reasonably be concluded that the juror, originally thought to be unbiased, actually cannot be fair and impartial. It necessarily follows that in such situations, as in the case at bench, where the fact of a sworn juror's impartiality comes into question as a result of that juror's conduct or

statements during the course of the trial or the deliberations, the failure of the court to make at least a preliminary inquiry into the facts of such impartiality cannot be said to be error harmless beyond a reasonable doubt. We conclude, therefore, that the court's failure to make an appropriate inquiry into the facts in order to determine whether they constituted good cause for discharge of the juror constitutes reversible error." (Emphasis added.)

On page 837 of our opinion in McNeal, we made it clear that an appropriate inquiry under Penal Code section 1120 consists of examining a sworn juror, and, under sections 1123 and 1089, a hearing, summary in nature and scope, but complete enough to determine good cause. Manifestly in any hearing under either code section due process requires the presence of the parties and the effective assistance of their attorneys.

In McNeal, significantly, although we paid "lip service" to Chapman error, our analysis found no occasion to examine and weigh the evidence in terms of "harmless error."

Finally, in any event, I would not conclude that the prosecution has proved beyond a reasonable doubt that Fagan was not prejudiced for several reasons. First,

such a fact essentially is incapable of proof; actually it requires "sheer speculation" (People v. Pierce (1979) 24 Cal.3d 199, 208) which, of course, is not permissible under Chapman. Second, the fact Spain and others were acquitted on several charges certainly indicates the presumption of innocence was not overcome by the entire evidence. But that does not mean that the fact Fagan knew Pratt, a Black Panther leader, murdered her friend played no part in her decision to convict those who were either Black Panthers or who were alleged to be associating criminally with Black Panthers. Perhaps Fagan actually knew whether or not she was influenced by this knowledge, but as I understand the law, after her verdict, we are not permitted to consider her opinion as to her state of mind. Finally, to paraphrase Glasser, to determine the precise degree of prejudice sustained by appellants by the trial court's "federal constitutional error"*/ is at once difficult and unnecessary. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." (Glasser v. United States, supra, 315 U.S. 60, 76.)

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*. See majority opinion, page 13.

I would reverse these judgments.

White, P. J.